167-624

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 289.

E. J. PECK AND LEO SIMMONS, TRUSTEES, PLAINTIFFS IN ERROR,

vs.

CHRISTIAN HEURICH.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JUNE 14, 1895.

(15,933.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1897.

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1 In the Court of Appeals of the District of Columbia.

E. J. PECK and LEO SIMMONS, Trustees, Appellants,
vs.
CHRISTIAN HEURICH. } No. 430.

Supreme Court of the District of Columbia.

EZRA J. PECK and LEO SIMMONS, Trustees,
Plaintiffs,
vs.
CHRISTIAN HEURICH, Defendant. } Law. No. 33269.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, among others were the following proceedings, to wit:

Declaration, &c.

Filed March 27, 1894.

In the Supreme Court of the District of Columbia.

EZRA J. PECK and LEO SIMMONS, Trustees,
Plaintiffs,
vs.
CHRISTIAN HEURICH, Defendant. } Law. No. 33269.

The plaintiffs, by leave of the court first had and obtained, hereby amend their declaration so that the same shall read as follows:

The plaintiffs sue the defendant to recover the possession of the undivided seventy-seventy-fifths ($\frac{70}{75}$) of those parts of all those tracts of land in the District of Columbia, outside of the city of Washington, known as Rosendale and Isherwood, now known as lots one, two, three, four, five, and six (1, 2, 3, 4, 5, & 6), in block twelve (12); all of block eight (8), lots seventeen, eighteen, nineteen, and twenty (17, 18, 19, & 20), in block two (2), and lots one, two, three, four, and five (1, 2, 3, 4, & 5) and sixteen, seventeen, and eighteen (16, 17, & 18), in block seven (7), in a certain subdivision made by S. H. Kaufmann and others and recorded in Liber Governor Shepherd, folio
13, of the records of the office of the surveyors of the District
2 of Columbia, in which the plaintiffs claim an estate in fee-simple, and of which they were lawfully possessed on, to wit, the first day of August, A. D. 1892, when the defendant entered the same and unlawfully ejected the plaintiffs therefrom, and from thence hitherto unlawfully detained and still continue to unlaw-

fully detain the same from the plaintiffs; and the plaintiffs claim the possession of said real estate and premises, with the appurtenances, besides the costs of this suit.

FRANKLIN H. MACKEY,
A. A. & T. W. BIRNEY,
LEO SIMMONS,
Att'ys for Plaintiffs.

* * * * * * *

MONDAY, *December* 31, *A. D.* 1894.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

The following case was assigned to Justice McComas, holding criminal court No. 1:

EZRA J. PECK and LEO SIMMONS, Trustees, Plaintiffs, *vs.* CHRISTIAN HEURICH, Defendant. } At Law. No. 33269.

This case coming on to be heard upon the plaintiffs' motion for a new trial and the same having been heard, it is considered that said motion be, and the same hereby is, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiffs take nothing by their suit, and the defendants go thereof without day and recover against said plaintiffs his costs of suit, to be taxed by the clerk, and have execution thereof.

* * * * * * *

In the Supreme Court of the District of Columbia.

E. J. PECK and LEO SIMMONS, Trustees, *vs.* CHRISTIAN HEURICH. } At Law. No. 33269.

The President of the United States to Christian Heurich (P., 5, Co.), Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 5th day of January, 1895, wherein E. J. Peck and Leo Simmons, trustees, are appellants and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants should not be corrected and why speedy justice should not be done to the parties in that behalf.

3

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this — day of ——, 189–.

——— ———,
Attorney for Appellee.

(Endorsed:) No. 33269. Law. E. J. Peck and Leo Simmons, trustees, *vs.* Christian Heurich. Citation. Issued Jan'y 5, 1895. Served copy of the within citation on within-named appellee Jan'y 5, 1895. Albert A. Wilson, marshal. F. H. Mackey, attorney for appellant.

Memorandum.

1895, January 17.—Bond for appeal filed.

Memorandum.

1892, Sept. 10.—Declaration filed.
" Oct. 3.—Plea " not guilty " filed.
1893, June 23.—Amended declaration filed.
" Oct. 5.—Plea not guilty "
1894, March 17.—Leave to pl'ff- to amend declaration.

Bill of Exceptions.

Filed in open court January 25, 1895.

In the Supreme Court of the District of Columbia.

EZRA J. PECK and LEO SIMMONS, Trustees,
vs.
CHRISTIAN HEURICH. } No. 33269. At Law.

Be it remembered that on the trial of this cause the plaintiffs, to maintain the issues on their part joined, gave in evidence from the land records of the District of Columbia a deed of conveyance dated November 8, 1828, and recorded the same day, in which William A. Bradley was grantor, and which deed purported to convey to Ann Bartlett in fee-simple the real estate described in the declaration, together with other real estate, in consideration of the sum of two thousand four hundred and fifty dollars; and thereupon counsel for plaintiffs announced to the court that they proposed to prove that the plaintiffs and defendants traced their respective titles to the land in controversy from said Ann Bartlett as a common source of title (which defendant, by his counsel, then and there denied); and plaintiffs, by their counsel, thereupon read in
4 evidence the depositions of Daniel and Fanny Bartlett (the said depositions having been taken under the statute in that case provided), which tended to prove, among other things, that said Ann Bartlett was duly married on the 17th of September, 1828, to John L. Bartlett at New Brunswick, New Jersey; that said Ann Bartlett departed this life on the third day of April, 1876, leaving surviving her her said husband, who subsequently departed this life at Hammontown, New Jersey, on the 24 day of September,

A. D. 1884; that Caldwell E. Smith, Anna Elizabeth Friar, Belle Lingan Cox, Kate J. Griswold, Hattie A. Billings, Archibald Lingan Bartlett, Henry B. Lingan Bartlett, William P. Alston, James M. Smith, McCubbin Lingan Bartlett, and Anna L. Peck were among the heirs-at-law of said Ann Bartlett (and as such heirs were on the 20th day of October, A. D. 1891, entitled to a certain undivided interest in fee in the lands of which said Ann Bartlett died entitled).

That the said heirs were at said time married to the other persons mentioned in the three deeds hereinafter referred to as the husbands and wives respectively of said heirs; that in addition to the evidence tending to show the foregoing facts the said deposition of Daniel W. Bartlett, as read to the jury, contained the following:

By Mr. TOBRINER (cross-examining):

"Q. Now, Mr. Bartlett, when did you first hear or learn of the proposed litigation with respect to these lots lying at Isherwood?

A. I don't know that I can tell you exactly.

Q. About when and how long ago?

A. Well, I should think perhaps six months ago.

Q. Was that the first time that you had been approached or interrogated with respect to them?

A. I think so.

Q. By whom?

A. By Mr. Simmons, I think, was the first information I had.

Q. By any one else?

A. No.

Q. Had you had any communication with any of your relatives with respect to these lands?

A. No, sir; didn't know anything about them.

Q. Do you know the controversy that is made in these suits?

A. I don't know much about it, sir.

Q. Do you know the issue that is made?

A. I don't know that I do.

Q. Do you know the issue that these suits are brought to recover?

A. Well, I suppose, to recover some title to lands here.

Q. In whose behalf?

A. Mr. Simmons, I suppose, has the matter in charge.

Q. For himself?

A. I suppose for the heirs.

Q. What is your information with respect to that?

A. No information, except what I received from Mr. Simmons.

Q. You are not a client of Mr. Simmons?

A. No, sir.

5 Q. What has he informed you?

Mr. BIRNEY: We object to the question as immaterial and incompetent, and only for that reason.

A. I don't know what he has informed me. It was a case in court touching upon the title to these lands, and we had some controversy.

Q. Where do you reside, Mr. Bartlett?

A. East Windsor, Connecticut.
Q. When did you come here?
A. I came here last Monday.
Q. At whose request?
A. At the request of Mr. Simmons.
Q. Where are you stopping?
A. I have been stopping with Mr. Simmons.
Q. Mr. Simmons' house?
A. Yes, sir.
Q. You and your wife?
A. Yes, sir.
Q. At whose expense did you come here?
A. I came on my own, so far.
Q. Was there any promise made to you to reimburse you your expenses?
A. No, sir.
Q. None whatever?
A. No, sir.
Q. How long have you resided, Mr. Bartlett, at East Windsor?
A. Since I was born.
Q. Were you born there?
A. Yes, sir."

Redirect examination:

"Q. You have said that you learned of this dispute over the title to the Isherwood property about six months ago. Will you look at the paper I now show you and refresh your recollection about it? State in whose handwriting is that paper (handing witness paper).
A. My own.
Q. To whom did you address it?
A. I think to Mr. Simmons.
Q. And when?
A. January 20th, 1893.
Q. Now look at that paper—that letter. Can you state how long before that time you first learned of this dispute?
A. I should think about this time (referring to the date of the letter).
Q. You wrote this letter in answer to one from Mr. Simmons, did you not?
A. I think I did; yes, sir.
Q. It refers to one from him?
A. Yes, sir.
6 Q. You have said that you got your information about this litigation received at that time and since then from Mr. Simmons. Did you receive information upon the subject from any other person; if so, from whom?
A. I think I did, from Mr. Peck and his wife.
Q. Is that Mr. Ezra A. Peck?
A. Yes, sir.
Q. And how are you related to his wife?
A. She is my brother's daughter.

Q. Did any other person than Mr. Simmons ask you to come here to testify?
A. Mr. Peck—Mr. Ezra J. Peck.
Q. Did Mr. Peck visit you on the subject?
A. He did.
Q. When?
A. I should think two weeks ago."

Recross-examination:

"Q. Mr. Bartlett, did you have any understanding or talk with Mr. Peck about your expenses in regard to coming here?
A. It seems to me I did; a few words with him.
Q. What were those words?
A. I don't know as I can repeat them to you.
Q. What was the substance of them?
A. I said I should have my expenses borne.
Q. By whom?
A. That was all that was said.
Q. Mr. Peck told you that your expenses would be repaid you?
A. I think so.
Q. Didn't tell you by whom?
A. No, sir.
Q. Have you been tendered them yet?
A. No, sir.
Q. Have you heard from any of the other parties in interest with respect to your coming on here as to this case?
A. No, sir."

And the deposition of FANNIE GRISWOLD BARTLETT, as read to the jury, contained, among other things, the following:

"Q. Mrs. Bartlett, you have talked over the history of your family considerably before coming here, have not you?
A. Well, I think we were rather an affectionate family and we were in the habit of talking it over a good deal together.
Q. But I mean just prior to your coming to the city here to testify in the case?
A. Not any more than usual, except with Mr. Peck.
Q. Except with Mr. Peck?
A. Yes.
7 Q. What was the purpose of his talking with you?
A. Why, of course he was talking about the business.
Q. Well, I know, but why should he talk to you about it?
A. Because, I suppose, we were persons who knew about these facts about his wife's relatives.
Q. He explained what the case was about, didn't he?
A. Very little to me.
Q. To whom did he explain it?
A. I suppose the most to his uncle (Daniel W. Bartlett), but you see I being deaf, I miss a good deal of the talk in the family. We had letters from Mrs. Peck for a year or more, I should think, and

always we had heard that her mother said that she had property in Washington, and that if they could get it it would make them comfortable; that is all I know; and Mrs. Peck frequently would say when I met her, Mother always said that if we had the lands that belonged to us in Washington we would have enough for us all."

EZRA J. PECK, one of the plaintiffs, besides giving evidence tending to prove the marriage and death of said Ann Bartlett and John L. Bartlett and the heirship of the parties, as hereinbefore set forth, gave evidence tending to prove that he thought he first ascertained that his wife had an interest in this land from a suggestion by Mr. Leo Simmons, his coplaintiff, through a letter. After Mr. Simmons suggested that his wife had an interest in the matter he began to look up these particular heirs. He wrote to them advising them of their interest. It was not necessary for him to find out their whereabouts—that is to say, he knew where nearly all of them resided from previous knowledge. He first learned of this interest his wife had in the property in 1890, and it was from a letter of Mr. Simmons that witness first learned of it. Witness did not correspond with the heirs of the property until he heard of it from Mr. Simmons.

Plaintiffs thereupon offered in evidence the records of the following deeds as the same appeared on the land records of the District of Columbia, in Liber 1768, at folios 1, 10, and 12, respectively, said instruments having been each recorded in said records on the 23rd day of November, A. D. 1892, and being in words and figures as follows:

This indenture made this twentieth day of October, in the year of our Lord one thousand eight hundred and ninety-one, by and between Caldwell E. Smith and Fannie A. Smith his wife Anna Elizabeth Friar and William S. Friar her husband, Belle Lingan Cox, Frank Cox, her husband, Kate J. Griswold and George Griswold her husband. Hattie A. Billings, Felix B. Billings her husband. Archibald Lingan Bartlett unmarried. Henry B. Lingan Bartlett unmarried. William P. Alston widower James M. Smith, Malisia M. Smith his wife. McCubbin Lingan Bartlett and Violetta D. Lingan Bartlett his wife parties of the first part and E. J.
8 Peck of Owego New York, and Leo Simmons of Washington D. C. trustees parties of the second part:

Whereas Ann Bartlett (whose husband John L. Bartlett died September 24th, 1884) died intestate, seized in fee of certain real estate situated in the District of Columbia leaving as her only heirs Annie L. Peck and James L. Bartlett her children. And James M. Smith, Caldwell E. Smith, Ann Elizabeth Friar, Belle Lingan Cox, parties hereto; and Mary Smith Alston now deceased, children of her daughter Mary C. Smith.

Said James L. Bartlett died intestate in 1886, leaving as his only heirs his children, Kate J. Griswold, McCubbin Lingan Bartlett, Archibald Lingan Bartlett and Henry B. Lingan Bartlett parties hereto; said Mary Smith Alston died intestate leaving as her heirs, Hattie A. Billings Mary M. Alston, Willie P. Alston, Claud C.

Alston, and Jennie G. Alston all under the age of twenty-one years, and leaving her husband Wm. P. Alston. Said Ann Bartlett having had six children three (Hannah O. Caldwell, Mary C. Smith and Susan L. Caldwell) by her first husband Elias B. Caldwell, and three (Annie L. Peck, James Lingan Bartlett and John L. Bartlett) by her second husband John L. Bartlett, all of whom died prior to said Ann Bartlett, unmarried and without leaving issue, except said Mary C. Smith (who also died prior to her mother, but left issue as aforesaid) Annie L. Peck (now living) and James Lingan Bartlett, who died in 1886, leaving issue as aforesaid.

And whereas the parties herein named are the only heirs of said Ann Bartlett.

And whereas the parties hereto believing it to be for their interest and convenience to do so, have agreed to execute these presents.

Now therefore this indenture, witnesseth, that the said parties of the first part for and in consideration of the sum of five dollars in lawful money of the United States to them in hand paid by the said parties of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said parties of the second part, their heirs and assigns forever, all the real estate of said Ann Bartlett, of which she died seized, situate, lying and being in the District of Columbia, whether in possession, remainder or reversion, or to which she was in any manner entitled, and which has come down in any manner from or through the said Ann Bartlett deceased, to the said parties hereto of the first part. More especially the land conveyed to said Ann Bartlett by William A. Bradley trustee, by deed of November 8th, 1828, recorded in Liber W. B. 23, folio 403 of the land records of the District of Columbia.

9 Together with all the improvements, ways, easements, rights privileges and appurtenances to the same belonging, or in anywise appertaining with all the remainders, reversions, rents, issues and profits thereof; and all the estate right, title, interest, claim and demand, either at law or in equity, or otherwise however, of the said parties of the first part, of, in, to or out of the said real estate and premises.

To have and to hold the said land and premises and appurtenances, unto and to the use of the said parties of the second part their heirs and assigns forever.

In trust nevertheless, to and for the following uses and purposes, namely; to take and hold possession of the said real estate, and to institute and prosecute to, a final conclusion in their own names any and every action suit or proceeding in law, and in equity, or otherwise, however for the possession of said real estate, if in their judgment expedient, and to compromise, pay for, and purchase any outstanding claim or title against said real estate, if in their judgment expedient and generally to do any and everything in their

judgment expedient, which may be necessary to vest in them a perfect and unencumbered title in fee-simple to and the recovery of possession of said real estate, and upon the vesting in them of a perfect and unencumbered title in fee-simple, and the recovery of the possession of said real estate or before and without the same, and without such proceedings, acts and doings as they may think best, and at any time to sell and convey said real estate, or any part thereof, in fee-simple or in any quantity of estate or estates to any persons or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned and upon such sale or sales to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase-money and out of the purchase-moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture, that the said Leo Simmons one of the trustees or parties of the second part, shall retain 33⅓ per cent., or one-third, after paying all expenses, costs and expenditures of the said parties of the second part, in the execution of this trust, out of the same, and the other two-thirds or 66⅔ per cent., of said purchase-money, clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett their heirs or assigns according to their respective interest, and it is further understood between the parties to this indenture, that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a settlement shall have been made, then in that case, the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying, said costs and expenditures.

In testimony whereof, the parties of the first part have hereunto set their hands and seals on the day and year first above written.

CALDWELL E. SMITH. [SEAL.]
FANNIE A. SMITH. [SEAL.]
ANNA ELIZABETH FRIAR. [SEAL.]
WILLIAM STEEL FRIAR. [SEAL.]
BELLE LINGAN COX. [SEAL.]
FRANK COX. [SEAL.]
KATE J. GRISWOLD. [SEAL.]
GEORGE GRISWOLD. [SEAL.]
HATTIE A. BILLINGS. [SEAL.]
FELIX B. BILLINGS. [SEAL.]
ARCHIBALD LINGAN BARTLETT. [SEAL.]
HENRY B. LINGAN BARTLETT. [SEAL.]
WILLIAM P. ALSTON, [SEAL.]
Guardian of the Minor Heirs of Mary Smith Alston, Deceased. [SEAL.]
JAMES M. SMITH. [SEAL.]
MRS. MALISIA M. SMITH. [SEAL.]
VIOLETTA D. LINGAN BARTLETT. [SEAL.]
McCUBBIN LINGAN BARTLETT. [SEAL.]

And attached to said deed and recorded and read in evidence therewith are certificates of acknowledgment by the grantors therein made, by officers authorized by law to take acknowledgments of deeds and certificates, in due form, and made by the proper officers to the official character of said officers by whom said acknowledgments appear to have been taken, said acknowledgments and certificates being severally dated as follows, in the following order and taken at the respective places named:

Names of grantors.	Date of acknowledgment.	Date of certificates of official character.
Archibald L. Bartlett and Henry B. Lingan Bartlett.	Apr. 27, 1892, Harris county, Texas.	Apr. 27, 1892.
Frank Cox and Belle Lingan Cox, his wife.	May 12, 1892, Frio county, Texas.	May 19, 1892.
William S. Friar and wife, Anna Elizabeth Friar; William Alston, Hattie A. Billings and husband, Felix B. Billings.	May 19, 1892, DeWitt county, Texas.	May 19, 1892.
Caldwell E. Smith and wife, Fannie A. Smith.	May 24, 1892, Gonzales county, Texas.	May 25, 1892.
James M. Smith and wife, Malisia M. Smith.	June 2, 1892, Lavaca county, Texas.	June 20, 1892.
Kate J. Griswold and George Griswold, her husband.	Apr. 8, 1892, New Orleans, La.	Oct. 10, 1892.
McCubbin Lingan Bartlett and Violetta D. Lingan Bartlett, his wife.	July 2, 1892, Fairfield county, Connecticut.	July 2, 1892.

11 This indenture, made this 22nd day of June in the year of our Lord one thousand eight hundred and ninety-two, by and between Annie L. Peck and E. J. Peck, her husband; said Annie L. Peck being one of the heirs of Ann Bartlett, of Owego, New York parties of the first part, and H. Austin Clark trustee of same place party of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of one ($1.00) dollar lawful money, to them in hand paid by the party of the second part, the receipt of which, before the sealing and delivery of these presents, is hereby acknowledged, have given, granted, bargained, and sold, aliened, enfeoffed, released, conveyed and confirmed, and do by these presents give, grant, bargain, and sell, alien, enfeoff, release, convey and confirm unto the party of the second part his heirs and assigns, forever the following-described land and premises, situate, lying and being in the city and county of Washington, District of Columbia, and distinguished as all the real estate of which Ann Bartlett died seized or possessed or in any way or manner entitled to together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity or otherwise however, of the parties of the first part, of, in, to, or out of the said land and premises.

To have and to hold the said land and premises and appurtenances, unto and to the only use of the party of the second part his heirs and assigns, forever in trust to convey to E. J. Peck and Leo Simmons trustees, to hold upon the trust as in deed from James Smith, *et al.*, to said Peck and Simmons trustees, bearing date on the 20th of October, 1891, to be recorded among the land records of the D. C. and the said parties of the first part their heirs, executors and administrators do hereby covenant and agree to and with the party of the second part, his heirs and assigns, that they the parties of the first part and their heirs shall and will warrant and forever defend the said land and premises and appurtenances unto the party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same or any part thereof, or interest therein, by, from, under and through them or any of them.

And further, that the parties of the first part and their heirs shall and will, at any and at all times hereafter, upon the request and at the cost of the party of the second part, his heirs and assigns, make and execute all such other deed or deeds or other assurance in law, for the more certain and effectual conveyance of the said lands and premises and appurtenances unto the party of the second part, his heirs or assigns, as the party of the second part, his heirs or assigns, or his or their counsel, learned in the law, shall advise, devise or require.

In testimony whereof, the parties of the first part have here-
12 unto set their hands and seals on the day and year first hereinbefore written.

ANNIE L PECK. [SEAL.]
E. J. PECK. [SEAL.]

Signed, sealed, and delivered in the presence of—
EDITH L. PECK.
B. W. LORING.

STATE OF NEW YORK, } ss, *To wit:*
County of Tioga, }

I, B. W. Loring, a notory public in and for the said county and State, do hereby certify that Annie L. Peck and E. J. Peck, her husband, parties to a certain deed bearing date on the 22nd day of June, A. D. 1892, and hereto annexed, personally appeared before me in the said county and State, the said Annie L. Peck and E. J. Peck, her husband, being personally well known to me as the persons who executed the said deed, and acknowledged the same to be their act and deed, and the said Annie L. Peck, being by me examined privily and apart from her husband and having the deed aforesaid fully explained to her by me, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and official seal this 22nd day of June, A. D. 1892.

[NOTARIAL SEAL.]

B. W. LORING,
Notary Public.

STATE OF NEW YORK, } *To wit:*
County of Tioga, }

I, Orlando G. King, clerk of said county and also clerk of the county and supreme court- held therein, do hereby certify (having official cognizance of the fact) that B. W. Loring, whose genuine signature is affixed to the foregoing and annexed acknowledgment, was at the time of taking and certifying said acknowledgment a notary public in and for the county and State aforesaid and duly qualified according to law.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of June, A. D. 1892.

[Seal of Tioga County, New York.]

O. G. KING, *Clerk.*

This indenture, made this 22nd day of June in the year of our Lord one thousand eight hundred and ninety-two, by and between H. Austin Clark (of Owego Tioga Co. N. Y.) trustee, party of the first part, and E. J. Peck of Owego, New York and Leo Simmons of Washington, D. C. trustees parties of the second part:

Witnesseth, that the said party of the first part, for and in consideration of one dollar lawful money, to him in hand paid by the parties of the second part, the receipt of which, before the
13 sealing and delivery of these presents, is hereby acknowledged, has given, granted, bargained, and sold, aliened, enfeoffed, released, conveyed, and confirmed, and does by these presents give, grant, bargain and sell, alien, enfeoff, release convey and confirm unto the parties of the second part, their heirs and assigns, forever the following-described land and premises, situate, lying and being in the city and county of Washington, District of Columbia, and distinguished as all the real estate of which Ann Bartlett died seized, being the same property conveyed to the party of the first part by Annie L. Peck and E. J. Peck bearing even date herewith together with all and singular the improvements, ways, easements, rights, privileges and appurtenances to the same belonging, or in anywise appertaining, and all the estate, right, title, interest and claim, either at law or in equity or otherwise however, of the party of the first part, of, in, to or out of the said land and premises.

To have and to hold the said land and premises and appurtenances, unto and to the only use of the parties of the second part their heirs and assigns, forever in trust nevertheless to hold as in deed from James Smith *et al.*, bearing date on the 20th day of October 1891, to the grantees herein to be recorded among the land records of the D. C. and the party of the first part and his heirs executors and administrators do hereby covenant and agree to and with the parties of the second part, their heirs and assigns, that he the party of the first part and his heirs shall and will warrant and forever defend the said land and premises and appurtenances unto the parties of the second part, their heirs and assigns, from and against the claims of all persons claiming or to claim the same or any part

thereof, or interest therein by, from, under and through him, them or any of them.

And further, that the party of the first part and his heirs shall and will, at any time and all times hereafter upon the request and at the cost of the parties of the second part, their heirs and assigns, make and execute all such other deed or deeds, or other assurance in law, for the more certain and effectual conveyance of the said land and premises and appurtenances unto the parties of the second part, their heirs or assigns, as the parties of the second part, their heirs or assigns, or their counsel, learned in the law, shall advise, devise or require.

In testimony whereof, the party of the first part, has hereunto set his hand and seal on the day and year first hereinbefore written.

H. AUSTIN CLARK, *Trustee.* [SEAL.]

Signed, sealed, and delivered in the presence of—
B. W. LORING.
THEO. R. TUTTIELL.

STATE OF NEW YORK, *County of Tioga,* } *To wit, ss:*

I, B. W. Loring, a notary public in and for the said county and State, do hereby certify that H. Austin Clark, trustee, party
14 to a certain deed bearing date on the 22nd day of June, A. D. 1892, and hereto annexed, personally appeared before me in the said county and State, the said H. Austin Clark being personally well known to me as the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and official seal this 22nd day of June, A. D. 1892.

[NOTARIAL SEAL.] B. W. LORING, *Notary Public.*

STATE OF NEW YORK, *County of Tioga,* } *To wit:*

I, Orlando G. King, clerk of said county and also clerk of the county and supreme courts held therein (courts of record), do hereby certify (having official cognizance of the fact) that B. W. Loring, whose genuine signature is affixed to the aforegoing and annexed acknowledgment, was at the time of taking and certifying said acknowledgment a notary public in and for the county and State aforesaid and duly qualified according to law.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 25th day of June, 1892.

[Seal of Tioga County, N. Y.]

O. G. KING, *Clerk.*

But the counsel for the defendant objected to the said records of said instruments being received in evidence on the grounds following, to wit:

First. That this suit was brought on September 20, 1892, and the

first of said deeds is dated October 20, 1891, and is recorded November 23, 1892.

Second. That the said deed is void and not sufficient to pass title, because it is not recorded within six months from its date.

Third. Because said deeds are clearly champertous on their face and void for that reason.

And the presiding justice sustained said objection of the defendant and refused to allow said records or any of them to be given in evidence on the ground that said deeds were champertous on their face and also as shown by surrounding circumstances, including the fact that there were some twenty-odd ejectment suits on his trial calendar brought by these same plaintiffs against different defendants to recover other portions of this same tract, of which fact he would take judicial notice. These suits had not been offered in evidence. And said justice expressed no opinion upon the other grounds of objection aforesaid.

And thereupon plaintiffs' counsel withdrew the offer of said deeds in evidence and claimed the right to call the plaintiff Leo Simmons to the stand to show the surrounding circumstance (alluded to by the court in its opinion declining to admit the deeds in evidence).

And thereupon said LEO SIMMONS, being duly sworn as a witness on behalf of the plaintiffs, gave evidence tending to prove
15 that some time prior to the making of the three deeds set forth in this record he was employed by the heirs of Elias B. Caldwell (who was the first husband of Ann Bartlett) to bring suit to recover a piece of land in the District of Columbia; that in the course of that investigation he discovered the title to the lands in controversy in this suit; that he communicated the fact of his discovery to Miss Hattie L. Wright, one of the Caldwell heirs. The witness was then asked—

By Mr. BIRNEY: What did you do after communicating the fact to Miss Wright?

Mr. MATTINGLY: We object to that.

Mr. BIRNEY: I had better make my offer of what I purpose to prove. I offer now to prove by the witness that he was instructed by Miss Wright to communicate the fact of the title remaining in the heirs of Ann Bartlett to this property to Mr. Peck, his present cotrustee, and that in consequence of that direction he did so communicate it to Mr. Peck.

The COURT: That involves the conversation had between her and him. I sustain the objection. He can state what he did and wrote, but not what Miss Wright did or said.

And thereupon, the court having refused to permit said question to be answered by the witness, the plaintiffs, by their counsel, excepted, and the exception was noted by the presiding justice upon his minutes, and the said witness was thereupon further interrogated as follows:

By Mr. BIRNEY:

Q. You have said that you communicated this matter to Miss Wright?

A. Yes, sir.

Q. Did you receive an answer from her?

A. She was in my office and we talked it over.

Q. What did you do in consequence of that conversation?

A. I wrote to Mr. Peck about it.

Q. Did you have any agreement with the Bartlett heirs or Mr. Peck or other members of the family other than what appears upon the face of these deeds which have been offered in evidence?

A. No, sir.

Cross-examination:

Q. You say you were employed by the Caldwell heirs to bring suit to recover possession of a lot in square No. 128?

A. Yes, sir.

Q. How did you first learn of any defect in the title to that lot?

A. I did not say an ejectment suit.

Q. State whether or not, in connection with this property, you first approached one of the Caldwell heirs relative to it, or one of the Caldwell heirs first employed you.

16 To which question, at the time the same was asked and before the witness' answer thereto was taken, the plaintiffs, by their counsel, objected; which objection the presiding justice overruled and permitted the same to be answered, and the witness answered:

"A. It has been some time ago and I hardly remember how that was; but I believe, though, that I attempted to buy that land from the Caldwell heirs. I think that is the way it was."

To which ruling of the court in permitting said question to be asked and an answer thereto to be taken the plaintiffs, by their counsel, excepted, and the exception was noted by the justice presiding on his minutes. And thereupon the counsel for the defendant asked the following questions of the said witness:

Q. Was some one else in possession of it?

A. No, sir.

Q. Or some one else claiming title to it?

To which question, at the time the same was asked and before the witness' answer thereto was taken, the plaintiffs, by their counsel, objected; which objection the presiding justice overruled and permitted the same to be answered, and the witness answered:

A. I think the Gunton estate was claiming title to it.

Q. You know it, don't you?

A. Yes, sir.

To which ruling of the court in permitting said question to be asked and an answer thereto to be taken the plaintiffs, by their

counsel, excepted, and the exception was noted by the justice presiding on his minutes.

And thereupon the plaintiffs, by their counsel, again offered in evidence the record of the three deeds heretofore referred to—that is to say, the deed dated the 20th day of October, 1891, from Caldwell B. Smith *et al.* to Peck & Simmons; the deed dated the 22nd of June, 1892, from Annie L. Peck *et vir* to H. Austin Clark, and the deed dated June 22, 1892, from H. Austin Clark to Peck & Simmons, as the same have been incorporated in this record.

To which offer the defendant, by his counsel, objected, and the court sustained said objection and refused to allow said record of said deeds to be read in evidence to the jury; to which ruling of the court in refusing to allow said records of said deeds to be read in evidence the plaintiffs, by their counsel, then and there excepted, and the exception was noted by the justice presiding on his minutes.

It was thereupon admitted by counsel for the defendant that the undivided interest in the parcel of land in suit claimed by plaintiffs in their declaration and proof largely exceeds in value five thousand dollars.

And thereupon the plaintiffs' counsel announced to the court that the refusal of the court to admit the aforesaid records of said three deeds in evidence broke the continuity of plaintiffs' title, and that they would therefore rest their case.

17 Wherefore the court instructed the jury to render a verdict for the defendant, which was done; to which ruling of the court in so instructing the jury the plaintiffs, by their counsel, then and there duly excepted, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the plaintiffs, by their counsel, requested the court to sign and seal this their bill of exceptions, which is accordingly done, *nunc pro tunc*, this 25th day of January, A. D. 1895, and the same is made part of the record in this cause.

L. E. McCOMAS,
Asso. Justice. [SEAL.]

FRIDAY, *January* 25, *A. D.* 1895.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

PECK and SIMMONS, Plaintiffs,
vs.
CHRISTIAN HEURICH, Defendant. } 33269. At Law.

This case was tried before Justice McComas.

Upon sufficient cause shown to the court, it is ordered that the time for filing the transcript of record in the Court of Appeals be, and the same is hereby, extended until and including the 15th day of February, 1895.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 33, inclusive, are true copies of the originals in cause No. 33269, at law, wherein Ezra J. Peck and Leo Simmons, trustees, are plaintiffs and Christian Heurich is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 31st day of January, A. D. 1895.

JOHN R. YOUNG, *Clerk.*

In the Court of Appeals of the District of Columbia.

EZRA J. PECK *et al.*, Appellants, *vs.* CHRISTIAN HEURICH, Appellee. } Law. No. 430.

Leon Tobriner, Esq., att'y for appellee:

You are hereby notified that upon the hearing of the above-entitled cause in this court the appellants will urge as the errors
18 for which the plaintiffs (appellants) prosecute this appeal or writ of error the following, to wit:

1. The court below erred in refusing to admit in evidence the deed from Caldwell E. Smith *et al.* to A. J. Peck and Leo Simmons as set forth on page 14 *et sequitur* of the transcript of the record.

2. The court below erred in refusing to admit in evidence the deed from Annie L. Peck *et ux.* to H. Austin Clark as set forth on page 21 *et sequitur* of said transcript.

3. The court erred in refusing to admit in evidence the deed from H. Austin Clark to E. J. Peck *et al.* as set forth on page 24 *et sequitur* of said transcript.

4. The court erred in holding that said deeds or any of them were champertous.

5. The court erred in instructing the jury to render a verdict for the defendant.

And for the hearing of said assignments of error the appellants hereby designate the following portions of said transcript as unnecessary to be printed and will direct the clerk to omit them, to wit:

Beginning with the tenth line on page 2 and omitting all thereafter down to and including page 5.

FRANKLIN H. MACKEY,
A. A. & T. W. BIRNEY,
Att'ys for Appellants.

Service acknowledged this 5th day of February, A. D. 1895.

LEON TOBRINER,
Of Counsel for Def't.

(Endorsed:) Court of Appeals, D. C., January term, 1895. No. 430. E. J. Peck *et al.*, trustees, appellants, *vs.* C. Heurich. Appellants' assignment of errors and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Feb. 5, 1895. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 430. E. J. Peck and Leo Simmons, trustees, appellants, *vs.* Christian Heurich. Court of Appeals, District of Columbia. Filed Feb. 5, 1895. Robert Willett, clerk.

19 TUESDAY, *April 16th, A. D.* 1895.

E. J. PECK and LEO SIMMONS, Trustees, Appellants,
vs.
CHRISTIAN HEURICH. } No. 430.

The argument in the above-entitled cause was commenced by Mr. Franklin H. Mackey, attorney for the appellants.

WEDNESDAY, *April 17th, A. D.* 1895.

E. J. PECK and LEO SIMMONS, Trustees, Appellants,
vs.
CHRISTIAN HEURICH. } No. 430.

The argument in the above-entitled cause was continued by Mr. F. H. Mackey, attorney for the appellants, and was further continued by Messrs. Leon Tobriner and Wm. F. Mattingly, attorneys for the appellee, and was concluded by Mr. F. H. Mackey, attorney for the appellants.

20 E. J. PECK and LEO SIMMONS, Trustees, Appellants,
vs.
CHRISTIAN HEURICH. } No. 430.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is a suit in ejectment, instituted in the supreme court of the District of Columbia by the appellants as plaintiffs, to recover possession of certain undivided interests in a tract of land known as Rosendale and Isherwood, situated in the District of Columbia and adjoining the northeastern boundary of the city of Washington, from which they claimed in their declaration, filed on September 10, 1892, to have been unlawfully ejected by the appellee on August 1, 1892, and to be still by him unlawfully excluded therefrom. The declaration was twice amended, the last amended declaration, upon which the trial was had, having been filed on March 27, 1894

To each of them the defendant pleaded the general issue "Not guilty."

At the trial, as appears from the bill of exceptions, the plaintiffs first offered in evidence, from the land records of the District of Columbia, the transcript of a deed of conveyance from one William A. Bradley to one Ann Bartlett, dated on November 8, 1828, and recorded the same day, which purported to convey the real estate mentioned in the declaration, as well as other real estate. And thereupon counsel for plaintiffs announced that they proposed

21 to prove that the plaintiffs and defendants traced their respective titles to the land in controversy from said Ann Bartlett as a common source of title. Counsel for the defendant then and there denied that they held from any common source of title, and no proof whatever was offered of any such common source.

Two depositions were then read in evidence on behalf of the plaintiffs to show who were the heirs-at-law of Ann Bartlett; that Ann Bartlett was married on September 17, 1828, to John L. Bartlett, at New Brunswick, New Jersey, who, it seems, was her second husband; that she died on April 3, 1876; that her said husband survived her and died in New Jersey on September 24, 1884, and that her heirs-at-law were the same persons who are mentioned as grantors in three several deeds that were thereafter offered in evidence on behalf of the plaintiffs and were refused by the court.

Upon the cross-examination of these deponents and of the plaintiffs themselves, who testified as witnesses in the case, it was sought to be shown that the suit itself and the deeds referred to were the result of a champertous agreement between the plaintiff Leo Simmons and the heirs of Ann Bartlett.

Three several deeds were then offered in evidence on behalf of the plaintiffs, two of which were merely ancillary and intended to complete the principal deed. This principal deed purported to be a conveyance in fee-simple from the heirs of Ann Bartlett to Ezra J. Peck and Leo Simmons, the plaintiffs in this cause, of all the real estate in the District of Columbia derived to them by inheritance from said Ann Bartlett, but in trust, however, for certain specified

22 purposes stated in the deed itself, as follows:

"In trust, nevertheless, to and for the following uses and purposes, namely: to take and hold possession of the said real estate, and to institute and prosecute to a final conclusion in their own names any and every action, suit or proceeding in law and in equity, or otherwise however for the possession of said real estate, if in their judgment expedient, and to compromise, pay for, and purchase any outstanding claim or title against said real estate, if in their judgment expedient, and generally to do any and every thing in their judgment expedient, which may be necessary to vest in them a perfect and unincumbered title in fee-simple to and the recovery of possession of said real estate, and upon the vesting in them of a perfect and unincumbered title in fee-simple and the recovery of the possession of said real estate or before and without the same, and without such proceedings, acts and doings as they

may think best, and at any time to sell and convey said real estate, or any part thereof, in fee-simple or in any quantity of estate or estates to any person or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned, and upon such sale or sales to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase-money; and out of the purchase-moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture, that the said Leo Simmons, one of the trustees or parties of the second part, shall retain 33⅓ per cent., or one-third, after paying all expenses, costs and expenditures of the said parties of the second part, in the execution of this trust, out of the same, and the other two-thirds or 66⅔ per cent. of said
23 purchase-money, clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett, their heirs or assigns, according to their respective interest; and it is further understood between the parties to this indenture, that should Leo Simmons die after suit has been begun for the recovery of any of said property, and before a settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

To the introduction of this deed in evidence objection is made on the part of the defendant on three several grounds:

1°. Because it was not executed, at least not completely executed, until after the suit was instituted—the deed, although bearing date on October 20, 1891, not having been recorded until November 23, 1892, which was upwards of two months after the institution of the suit (September 20, 1892);

2°. Because it was not recorded within six months after its date, and was therefore, as it is claimed, insufficient to pass title; and

3°. Because the deed on its face was champertous and therefore void.

Without expressing any opinion on the first or second ground, the presiding justice, in a very able opinion, which is given in the brief of the appellee, sustained the objection on the third ground, held that the deed was plainly champertous in its character, and therefore excluded it from the evidence. It is a peculiar fact in this connection, although perhaps not important, in the view which we take of the case, that the paper offered in evidence by the plaintiffs was not the original deed, although that must have been in
24 their possession, but the transcript from the land records of the District of Columbia. This has been made a ground of objection to the deed, together with the grounds assigned in the record, in the argument before us.

In the oral testimony adduced on behalf of the plaintiffs it was shown that the plaintiff Leo Simmons it was who discovered the alleged interest of the heirs of Ann Bartlett in the property in controversy; that he had caused his discovery to be communicated to

them; that he procured the execution of the foregoing deed to himself and Peck; that Peck was the husband of one of the heirs, and that he was joined in the deed as joint grantee with Simmons for the reason that the heirs wanted in the trust a person whom they knew, while Simmons, who was a stranger to them, should have the active management.

To the action of the court in excluding from the evidence the deed to Peck and Simmons the plaintiffs duly excepted. Their counsel then "announced to the court that the refusal of the court to admit the aforesaid records in evidence broke the continuity of plaintiff's title, and that they would therefore rest their case." The court thereupon instructed the jury to return a verdict for the defendant, which was accordingly done, and to this also the plaintiffs excepted.

There was judgment for the defendant on the verdict, and from this judgment the plaintiffs have appealed.

The substantial question raised by the exceptions and by the assignments of error is, whether the deed of conveyance from the heirs of Ann Bartlett was inadmissible in evidence, either on the ground of champerty or for any other invalidity; but another question, also of great importance, is raised by the record
25 and has been much insisted upon by counsel for the appellee, and that is, whether, even if there was error in the exclusion of the deed, there was not a total failure of proof on the part of the plaintiffs, such as to justify the entry of judgment for the defendant in any event.

With reference to this second question, which we may consider first, it appears to us that the course pursued by the plaintiffs ought not to be sanctioned. If approved, it involves the establishment of the practice in suits in ejectment, and indeed in most other suits, that a plaintiff may try his case by piecemeal; that if any piece of evidence which he regards as essential, or even important, is ruled out, he may abandon the trial, take the chances of appeal, and then, if successful, pursue the same course upon a new trial with reference to the next piece of evidence, and thus there would be a possibility of innumerable trials and innumerable appeals in the same suit, with the result that the administration of justice would be practically blocked. It is very true that it would seem to be a useless waste of time and effort to offer evidence, or to make formal profert of evidence, when one of the essential links in the chain has been broken, and counsel are perfectly well aware that with such link broken there can be no recovery; but at the same time, as no plaintiff is entitled to verdict or judgment unless he makes out a complete *prima facie* case, it is impossible, in the absence of profert of such a case, for either the court of primary jurisdiction or an appellate tribunal to determine whether he has been actually prejudiced, in contemplation of law, by the exclusion of any specific piece of evidence.

Assuming for the present that it might have been error to exclude the deed in controversy, yet the plaintiffs were not
26 thereby prejudiced if for any other reason they were not

entitled to recover. They began their proof with the introduction of a deed from one William A. Bradley to Ann Bartlett; but there is nothing to show that Bradley had any title, or was ever in possession, or had any right to the possession of the property, or that the State had ever granted the property. This is an insufficient basis of title (Mitchell *vs.* Mitchell, 1 Md., 44, 52), and if the plaintiffs had in all other respects fully proved their case it would not necessarily follow that they would be entitled to recover.

Possibly in reference to old titles, such as that involved in this suit may have been, it may be difficult, if not impossible, to deduce a complete chain of title from the State; but that is a difficulty for legislation to obviate, and the difficulty may in many cases, perhaps in most cases, be removed by proof of possession in the person from whom the title is sought to be deduced. It is obvious, at all events, that, inasmuch as any one may make a deed with or without title, some testimony is required either to show a grant from the State or possession under claim of title from which such grant may be inferred. There was nothing of the kind here.

It is true that counsel for plaintiffs announced to the court that they proposed to prove that Ann Bartlett was the common source of the title both of the plaintiffs and the defendant, but the fact was denied at the time by the counsel for the defendant, and the proof was never made or offered to be made. Such announcement, therefore, amounted to nothing.

Again, it was alleged in the declaration that the defendant unlawfully detained the property from the plaintiffs. The plea of the general issue placed upon the plaintiffs the burden of proving
27 that the defendant was in possession. No such proof was given or offered to be given. Without it the plaintiffs would not have been entitled to recover against the defendant, even if they had in all other respects fully proved their case.

It does not follow that the judgment was erroneous because the deed in controversy may have been improperly excluded. In order to reach that conclusion we must assume that the plaintiffs would have proved the residue of their case by wholly unobjectionable testimony, and this is what we have no right to assume.

We think it was due to the plaintiffs themselves that their cause should have been fully set forth; to the defendant that he should not be vexed with repeated trials for the settlement of questions that might be all settled in one trial, and to the court that its judgment should have the stability resulting from a full presentation of the plaintiffs' claim.

But we do not deem it necessary to base our decision on this ground. The court below based its decision on the ground of champerty, and there seems to be no reason why we should seek to avoid the determination by us also of that issue.

It is quite apparent that the practices known by the designation of champerty and maintenance are not obsolete in the District of Columbia, and it is equally apparent that there is no good reason why the law in regard to them should be held to be of less binding force now than at any former time. Many things, it is true, that

were once regarded as champertous or savoring of maintenance are no longer so characterized with us. Deeds by parties out of possession, for example, are not now void for that reason. It is now lawful to stipulate for contingent fees. And it may be
28 even meritorious to aid the poor with money in their effort to recover just legal rights by means of legal proceedings. But from the fact that some of the things which were once reprobated on some peculiar ground of existing public policy are now regarded as perfectly legitimate, in view of the altered conditions of society, it does not follow that the law regarding champerty and maintenance has therefore been abolished.

In the recent case of Johnson *vs.* VanWyck (D. C. Appeals, p. —) we said:

"Unnecessary and speculative litigation, the promotion of inexcusable strife, the vexation of landholders, and the laying of embargoes on the free alienation of their holdings are as pernicious now as they ever were, and as needful of redress. Contracts which tend to promote these evils are as much opposed to sound public policy as they ever were, and therefore ought not to be enforced."

In that case we also said in reference to the definition of what constitutes champerty, citing from approved and well-recognised authorities on the subject:

"Champerty is the unlawful maintenance of a suit in consideration of an agreement to have a part of the thing in dispute" (1 Hawk. P. C., 545; Co. Litt., 368). It has also been defined to be "a bargain to divide the land or thing in dispute on condition of his carrying it out at his own expense" (Stanley *vs.* Jones, 7 Bing., 369). These definitions have been very generally approved. (Roberts *vs.* Cooper, 20 How., 461; Brown *vs.* Beauchamp, 5 T. B. Monroe, 415)."

In the case of Cox *vs.* McPherson (94 U. S., 404), relied on
29 by the appellants to take the case now before us out of the operation of the law in regard to champerty, the Supreme Court of the United States, while holding the contract there under consideration not to be champertous, clearly indicated what it did regard as champerty. It said in that case, by Mr. Justice Miller:

"It is said that the contract is obnoxious to the doctrine of champerty. The answer is that the attorneys did not agree to pay any of the costs; they did not agree to take any part of the land which was the subject of the suit for their compensation, nor did they agree to take anything but money. The single fact that they agreed to wait for their money until complainant could sell the land, and to receive a fixed sum out of the purchase-money, does not, under any definition of champerty, bring it within that principle."

In the case before us it seems to us that the attorney did all the things which are in these authorities enumerated as champertous. He agreed to pay the costs of the litigation, he agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of sale of it, which amounts to the same thing, and his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered or of the money that might be received by way of settle-

ment or compromise; and the character of the enterprise on the part of the attorney was so plainly a speculative one that in the deed the net results to him are mentioned as "profits." If this be not champerty, we fail to see wherein there can be champerty; for we are not willing to limit the law, as the argument for the appellants would seek to have us do, to such extreme, and we may even
30 say fantastic, enterprises as were developed in the case of Johnson *vs.* Van Wyck. We must regard an agreement by an attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery or of the thing in dispute as obnoxious to the law against champerty; and that this was the character of the arrangement in the present case we are entirely satisfied.

The very thing in dispute was conveyed, or sought to be conveyed, in advance to the attorney and an associate for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense; and in consideration of this he was to retain at the end of the litigation one-third of what had been conveyed to him, and was to account to his clients for the other two-thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land when recovered was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise.

There was considerable argument on behalf of the appellants expended in an attempt to show that the deed which contained the agreement of the parties did not expressly provide for the payment of the costs and expenses of the litigation by the attorney, and that he might be regarded as advancing the costs in the shape of a loan to his clients. It may be admitted that the contract contains no express covenant that the attorney shall pay the costs of litigation, but no express covenant for that purpose is required if that was the necessary result of the contract. The title, so far as the clients had title to convey, was vested in the attorney and his cotrustee for
31 the express purpose of instituting suits in their own names and in their own rights, and if the contract were wholly silent on the subject the plain inference would be that they should pay the costs and expenses. Costs and expenses were to be paid; costs and expenses, we presume, were paid, and plaintiffs are primarily liable for such costs and expenses.

But we are not left to this inference alone, nor is the contract silent upon the subject. The express provision of this document is that Simmons shall retain one-third of the proceeds of recovery "after paying all expenses, costs, and expenditures," and that the heirs of Ann Bartlett shall receive two-thirds of such proceeds, "clear of any cost or charges whatever." The plain import of this is that the heirs of Ann Bartlett shall be at no cost or expense whatever, and that Simmons shall receive one-third of the proceeds of the recovery, after he has paid the "expenses, costs, and expenditures." In other words, his right to the receipt of his compensation

is dependent on his previous payment of costs and expenses and such payment was necessarily part of the consideration for the compensation which he was to have.

We are unable to distinguish this case in principle from that of Johnson *vs.* Van Wyck, and we think the court below was entirely right in applying the law of that case to the present suit.

It may be proper for us to say that in nothing that we have here said is it our purpose to reflect on the honor or integrity of Mr. Simmons, the attorney in this case, who as such became one of the plaintiffs. His course throughout seems to have been straightforward and above-board; and while we must regard his action as
32 illegal and his contract as null and void, we presume that there was here only a misapprehension of the law and not an intentional violation of it.

In view of our opinion, as here stated, with reference to the main objection urged against the admissibility of the deed here in controversy, it is unnecessary to discuss the other grounds of objection that have been taken to it, for if the deed was null and void from the beginning by reason of its champertous character, as we think it was, the questions that have been discussed as to the time of its delivery and the effect of its registration with regard to the admissibility of the recorded transcript in the place of the original deed become unimportant, notwithstanding that they are in themselves questions of serious import.

We are of opinion that the court below was right in refusing to admit in evidence the deeds from the heirs of Ann Bartlett to the plaintiffs in this cause, and that it was right in directing a verdict and rendering judgment thereon for the defendant, and that judgment must therefore be affirmed with costs. It is so ordered.

33 TUESDAY, *May 7th, A. D.* 1895.

E. J. PECK and LEO SIMMONS, Trustees, Appellants, *vs.* CHRISTIAN HEURICH. } No. 430. April Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

May 7, 1895.

34 TUESDAY, *May 14th, A. D.* 1895.

E. J. PECK and LEO SIMMONS, Trustees, Appellants, *vs.* CHRISTIAN HEURICH.

On motion of Mr. F. H. Mackey, attorney for the appellants in the above-entitled cause, it is ordered by the court that a writ of

error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

35 Know all men by these presents that we, Ezra J. Peck and Leo Simmons, trustees, as principals, and Victor Anderson, as surety, are held and firmly bound unto Christian Heurich in the full and just sum of three hundred dollars, to be paid to the said Christian Heurich, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between E. J. Peck and Leo Simmons, trustees, appellants, and Christian Heurich, appellee, a judgment was rendered against the said E. J. Peck and Leo Simmons, trustees, and the said E. J. Peck and Leo Simmons, trustees, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Christian Heurich, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said E. J. Peck and Leo Simmons, trustees, shall prosecute said writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LEO SIMMONS, *Trustee.* [SEAL.]
EZRA J. PECK, *Trustee.* [SEAL.]
VICTOR ANDERSON. [SEAL.]

Sealed and delivered in the presence of—
L. McKENNA,
As to Simmons.
C. B. RUBERT,
As to E. J. Peck.
CHAS. G. MORTIMER,
As to Victor Anderson.

Approved by—
R. H. ALVEY, *Chief Justice.*

I have no objection to the surety on this bond.
LEON TOBRINER, *For Appellee.*

[Endorsed:] No. 430. E. J. Peck and Leo Simmons, trustees, appellants, *vs.* Christian Heurich. Bond on appeal to Supreme Court United States. Court of Appeals, District of Columbia. Filed May 20, 1895. Robert Willett, clerk.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between E. J. Peck and Leo Simmons, trustees, appellants, and Christian Heurich, appellee, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

37 UNITED STATES OF AMERICA, *ss:*

To Christian Heurich, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein E. J. Peck and Leo Simmons, trustees, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 20th day of May, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged this May 20th, 1895.

WM. F. MATTINGLY,
Att'y for Defendant in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 20, 1895. Robert Willett, clerk.

38 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 37, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of E. J. Peck and Leo Simmons, trustees, appellants, *vs.* Christian Heurich, No. 430, April term, 1895, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 8th day of June, A. D. 1895.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

39 In the Supreme Court of the United States.

EZRA J. PECK *et al.*
vs.
CHRISTIAN HEURICH.

The plaintiffs in error herewith assign as errors for which this appeal is prosecuted:

1st. That the said Court of Appeals erred in finding that the deeds from Caldwell E. Smith *et al.* to E. J. Peck and Leo Simmons, as set forth in *in* the record, were champertous and were rightly rejected as evidence.

2. And also in making the same ruling in respect of the deeds from Annie L. Peck *et ux.* to H. Austin Clark, and from H. Austin Clark to E. J. Peck *et al.*, as set forth in the record.

3. In holding that the trial justice rightly directed the jury to render their verdict for the defendant in error.

4. In affirming the judgment of the said trial court.

FRANKLIN H. MACKEY,
A. A. BIRNEY,
Att'ys for Pl'ffs in Error.

Endorsed on cover: Case No. 15,933. District of Columbia Court of Appeals. Term No., 289. E. J. Peck and Leo Simmons, trustees, plaintiffs in error, *vs.* Christian Heurich. Filed June 14, 1895.

FILED.
OCT 23 1895
JAMES H. McKENNEY,
CLERK.

167-624

Supreme Court of the United States

No. ~~623~~. ~~573~~ 289.

PECK AND SIMMONS, PLAINTIFFS IN ERROR,

vs.

CHRISTIAN HEURICH, DEFENDANT.

MOTION TO ADVANCE.

A. A. BIRNEY,
FRANKLIN H. MACKEY,
Attorneys for Plaintiffs in Error.

Law Reporter Print.

Supreme Court of the United States

No. 633.

PECK AND SIMMONS, PLAINTIFFS IN ERROR,

vs.

CHRISTIAN HEURICH, DEFENDANT.

Now come the plaintiffs in error in the above entitled cause and move the court to advance the same, and set an early day for the hearing thereof, for the reasons set forth and annexed to this motion.

A. A. BIRNEY,
FRANKLIN H. MACKEY,
Attorneys for Plaintiffs in Error.

This cause is one of fifteen (15) pending in the Supreme Court of the District of Columbia, by the same plaintiffs against various defendants. They are suits in ejectment brought to try the title to a large tract of land situated in the District of Columbia, outside of the city of Washington, which has been subdivided into lots, and said lots are now occupied by the defendants in the said fifteen suits. The above entitled cause is now in this court on a writ of error from the Supreme Court of the District of Columbia. It was selected as a test case by reason of the fact that the amount involved exceeds $5,000. A judgment in this case will determine that of all the cases, the principal

question being the construction of a deed under which the plaintiffs in error claim. Many of the other cases do not involve the sum of $5,000, and therefore cannot be appealed to this court; yet they are on the trial calendar of the Supreme Court of the District of Columbia, and are there awaiting hearing. The defendants are pressing the plaintiffs for trial of said cases, and inasmuch as the judgment of the Court of Appeals of the District of Columbia has been adverse to the plaintiffs in error upon the construction of the deed, the ruling in all of these cases must necessarily follow the ruling which has been made by the Court of Appeals in this case, which ruling is now before this court for review. Under the present procedure of the Supreme Court of the District of Columbia, where, as has been said, the said cases are now pending, they must be reached long before the above entitled cause is reached by this court in its regular course. The consequence to the plaintiffs would be that the Supreme Court of the District of Columbia would be obliged to follow the ruling made by the Court of Appeals, and render judgments in all of said cases against the plaintiffs, while no appeal or writ of error would lie to review said judgment by reason of the amount involved not reaching the jurisdictional limit of this court. The said judgments would be final, therefore, and plaintiffs in error, should the judgment in the above entitled cause be reversed, would be without remedy in said causes.

Because, therefore, of the unquestioned hardship that would result from said course of procedure, the plaintiffs in error humbly, but earnestly, request that the foregoing motion to advance the above entitled cause be granted.

Respectfully submitted.

A. A. BIRNEY,
FRANKLIN H. MACKEY,
Attorneys for Plaintiffs in Error.

FILED.
OCT 26 1895
JAMES H. McKENNEY,
CLERK.

167-624

Supreme Court of the United States

OCTOBER TERM, 1895.

No. ~~648~~. 289.

PECK AND SIMMONS

vs.

CHRISTIAN HEURICH.

REPLY OF DEFENDANTS TO MOTION TO ADVANCE.

WM. F. MATTINGLY,
For Defendant in Error.

Law Reporter Print.

Supreme Court of the United States

OCTOBER TERM, 1895.

No. 643.

PECK AND SIMMONS

vs.

CHRISTIAN HEURICH.

REPLY OF THE DEFENDANT IN ERROR TO MOTION TO ADVANCE FILED BY PLAINTIFFS IN ERROR.

There was no agreement that this should be a test case, nor will a judgment in this case necessarily determine that of all the cases, as an inspection of the record will show, the opinion of the Court of Appeals being adverse to plaintiffs in error, not only as to the admissibility of a certain champertous deed in evidence, but also because plaintiffs in error had not shown any evidence of legal title in them, or made any offer of such, or of a common source of title, which alone would necessitate an affirmance.

Plaintiff's desire is to obtain the opinion of this court as to the admissibility in evidence of one link in their chain of title without disclosing their whole case, whereas the decision of that question is not necessarily involved in the case.

Whilst I do not see that the rules for advancement of causes for hearing apply to the circumstances of this case any more than to several hundred others on the docket, yet I have no objection to its being advanced.

WM. F. MATTINGLY,
For Defendant in Error.

167-624

Office Supreme Court, U. S.
FILED.
MAR 29 1897
JAMES H. MCKENEY,
CLERK.

Supreme Court of the United States.

No. 289.

E. J. PECK AND LEO SIMMONS, TRUSTEES,

vs.

CHRISTIAN HEURICH.

BRIEF FOR PLAINTIFF IN ERROR.

FRANKLIN H. MACKEY,
ARTHUR A. BIRNEY,
For Plaintiffs in Error.

LAW REPORTER PRINT.

Supreme Court of the United States.

No. 289.

E. J. PECK AND LEO SIMMONS, TRUSTEES,

vs.

CHRISTIAN HEURICH.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This was an action of ejectment brought to recover an undivided 70-75ths of eighteen lots of ground in a tract of land in the District of Columbia commonly called Isherwood. The original declaration was filed September 10, 1892, and the amended declaration March 27, 1894. The plaintiffs claim title in fee simple as trustees under deeds from the heirs of one Ann Bartlett. On the trial, after offering in evidence a deed from one William A. Bradley to said Ann Bartlett in fee simple, counsel for plaintiffs announced to the court that they proposed to prove that the plaintiffs and defendants traced their respective titles to the land in controversy from said Ann Bartlett as a common source. Thereupon certain depositions were read tending to show the death of Ann Bartlett and her husband and that the persons named in the deeds of conveyance set forth in the record (pp. 7 to 14 inclusive) were among the heirs at law of said Ann, and as such entitled to a certain undivided interest in the lands in controversy, which undivided

interest was admitted to be worth over $5,000. Plaintiffs then offered the record of a deed of conveyance in fee set forth in the record, beginning at page 7. The deed purports to be executed by the aforesaid heirs of Ann Bartlett, and to convey to the plaintiffs in fee simple, but upon certain trusts (to be hereinafter mentioned), all their right, title, and interest to the lands in controversy. It is dated the 20th day of October, 1891, and acknowledged at different dates in different portions of the United States by the various grantors, the first of said acknowledgments being dated April 8, 1892, and the last July 2, 1892. To the various acknowledgments are attached certificates of the official character of the acknowledging officer, the earliest in date of these certificates being that of April 27, 1892, and the latest that of October 10, 1892. As the suit was brought September 10, 1892, it will thus be seen that the last certificate was dated just one month after the filing of the declaration. The deed itself was recorded among the land records of the District on the 23d day of November, 1892, or two months and thirteen days after the institution of this suit.

The record of two other deeds, executed in order to pass the title of the wife of the plaintiff Peck to him through a third party, were also offered in evidence in connection with the principal deed, but as they cut no special figure in the questions raised by the bill of exceptions, they need not be further alluded to.

Upon the offer in evidence of the record of the deed of the 20th of October, 1891, the defendant objected thereto on the following grounds:

First. That this suit was brought on September *20th* (the correct date is the 10th), 1892, and the first of said deeds is dated October 20, 1891, and is recorded November 23, 1892.

Second. That the said deed is void and not sufficient to pass title because it was not recorded within six months from its date.

Third. Because said deeds are clearly champertous on their face and void for that reason.

We now quote from the bill of exceptions:

> "And the presiding justice sustained said objection of the defendant and refused to allow said records or any of them to be given in evidence on the ground that said deeds were champertous on their face and also as shown by surrounding circumstances, including the fact that there were some twenty-odd ejectment suits on his trial calendar brought by these same plaintiffs against different defendants to recover other portions of the same tract, of which fact he would take judicial notice. These suits had not been offered in evidence. And said justice expressed no opinion upon the other ground of objection aforesaid."

Thereupon counsel for plaintiffs temporarily withdrew the offer of said deeds and called to the stand Leo Simmons, one of the plaintiffs who gave evidence tending to show what were "the surrounding circumstances" connected with said deeds. His evidence tended to prove (Rec. 15)—

> "That some time prior to the making of the three deeds set forth in this record he was employed by the heirs of Elias B. Caldwell (who was the first husband of Ann Bartlett) to bring suit to recover a piece of land in the District of Columbia; that in the course of that investigation he discovered the title to the lands in controversy in this suit; that he communicated the fact of his discovery to Miss Hattie L. Wright, one of the Caldwell heirs."

Witness was then asked what he did after communicating the fact to Miss Wright, but objection being made, counsel for plaintiff stated that he offered to prove by the witness—

> "That he was instructed by Miss Wright to communicate the fact of the title remaining in the heirs of Ann Bartlett to this property to Mr. Peck, his present co-trustee, and that in consequence of that direction he did so communicate it to Mr. Peck;"

but the court refused to permit said proof to be made, and this refusal constitutes the first exception.

The witness was then asked:

> "Q. You have said that you communicated this matter to Miss Wright?
> "A. Yes, sir.
> "Q. Did you receive an answer from her?
> "A. She was in my office and we talked it over.
> "Q. What did you do in consequence of that conversation?
> "A. I wrote to Mr. Peck about it.
> "Q. Did you have any agreement with the Bartlett heirs or Mr. Peck or other members of the family other than what appears upon the face of these deeds which have been offered in evidence?
> "A. No, sir."

After a brief cross-examination which is not now material to the questions raised by the bill of exceptions, plaintiffs again offered in evidence the three deeds, but the court held to its previous ruling and refused to admit them. Thereupon it was announced by plaintiff's counsel that the continuity of plaintiff's title being broken by this ruling, the plaintiffs could go no farther. The court thereupon instructed the jury to render a verdict for the defendant, which being excepted to and a motion for a new trial being overruled, the case comes here on the bill of exceptions to these rulings.

ASSIGNMENT OF ERRORS.

First. That the court erred in refusing to permit the plaintiff Simmons to testify that he was instructed by Miss Wright (on the occasion when he informed her of the fact of his discovery of title of the Bartlett heirs) "to communicate the fact of the title remaining in the heirs of Ann Bartlett to this property to Mr. Peck, his present co-trustee." This error constitutes the first exception.

Second. That the court erred in refusing to allow the three

deeds from the heirs of Bartlett to plaintiffs to be read in evidence.

Third. That the court erred in holding that said deeds were void as champertous.

ARGUMENT.

It is not believed that it will be necessary to argue the first assignment of error, unless the court should hold that the language of the deeds forming the principal controversy in this case can be supplemented by oral testimony. Our contention is that the deeds are plain and unambiguous and require no evidence to explain them.

Seitz *vs.* Brewer's Refrigerating Co., 141 U. S. 572.
Van Ness *vs.* Mayor of Washington, 4 Pet. 232.

But if evidence aliunde is to be admitted, certainly the witness may testify to the *facts* which show how the deed originated. He does not offer to testify to the details of any conversation held by him with Miss Wright, which of course would be res inter alios; his offer was to show the *fact* that he was instructed by her to make a certain communication to Mr. Peck, and that he did so. The court below did not distinguish between evidence offered to prove that a witness was instructed by a third party to *do* so and so, and that he did as he was instructed and evidence that a third party said so and so, for the purpose of proving the statement. What Miss Wright told the witness was relevant, not to show the truth of the statement, but to show the cause or motive for the witness action in communicating with Mr. Peck.

The second and most important exception is to the refusal to admit the deeds in evidence as set forth in the exception.

Three grounds of objection were made to these deeds by the defense, the first two of which are directed only to the principal deed, to wit, the deed from the Bartlett heirs to Peck and Simmons, dated October 20, 1891. The court be-

low declined to rule upon these two questions, preferring to decide the case upon the third ground of objection. But as they may be again insisted upon here, with what earnestness we will not undertake to say, it is perhaps well to notice them before proceeding to the principal contention.

First, then, it is said that the deed of October 20, is not admissible in evidence because it was recorded *after* the institution of the action.

This objection involves the proposition that *title* to land does not pass to the grantee until the deed is recorded. It is conceded that the title must be in the plaintiff at the time of bringing suit, but *that* title, it is clear, vests *eo instanti* that the deeds are executed and delivered. It was not necessary to record the deeds at all, except as a precaution against subsequent purchasers for value, and it is not contended that the defendant is such. The record is simply evidence that the deed was executed and delivered by the person and *at the time* it purports to have been executed and delivered.

Secondly. It is claimed that because the deed was not recorded within six months of its date the record thereof cannot be read in evidence.

It is true that by the ancient acts of Maryland, long since repealed by the Act of Congress, the record of such a deed could not be read in evidence.

But those statutes were repealed by subsequent legislation, and now the Act of Congress of April 29, 1878, Compiled Statutes, p. 498, Sec. 4 (20 St. 40), is the only act in force. That act, as is well known, places no limit upon the time within which a deed shall be recorded, except that as to subsequent purchasers it is given effect only from the time of record.

An objection was also made that one of the certificates to the official character of the acknowledging officer was not affixed until October 10, 1892, one month after the bringing of suit, and it was contended the certificate was a part of the

acknowledgment, and, until the acknowledgment of Mrs. Griswold was a completed fact, her title did not pass. Hollingsworth *vs.* Flint, 101 U. S. 591, was relied on for this proposition, but an examination of that case will show that it has no application to the case at bar. The facts of that case show that the deed was excluded in the trial of title to land in the State of Texas. On appeal the Supreme Court of the United States held that the deed was properly excluded because the action was brought in 1874, and—

> "at that time the deed had not been *acknowledged so as to pass the title*, if any, which the female grantor had in the premises in controversy. Her interest in the land, if any she had, was her *separate estate*, of which she could not *under the laws of Texas*, be divested except by conveyance of herself and husband, and after her privy examination before the proper officer. Such examination had not taken place when the action was commenced. The plaintiff could not avail himself in this action of a title acquired, or which did not subsist in him until after he commenced suit."

It happens, however, that *under the laws of the District of Columbia*, a wife may convey her *separate estate* without the joining of her husband, and that no privy acknowledgment was necessary. The deed was good and passed the title without such acknowledgment. But it is to be remembered that the objection in the case at bar is not to the *acknowledgment*, which was made *before* suit was brought, but to the certificate of the Secretary of State as to the official character of the acknowledging officer, which was affixed only to entitle the deed to be admitted to record, not to give any further validity to the deed itself. The deed was complete when acknowledged, and passed title when delivered, and is presumed to have been delivered at the time of its date, October 20, 1891.

Blake *vs.* Nash, 44 Ill. 302.

County of Henry *vs.* Bradshaw, 20 Iowa, 385.

The certificate was only a mode of proving the acknowledgment sufficient. But even conceding the point well taken, it would affect only the interest of Mrs. Griswold. The record was good evidence that the title of all the other grantors had passed to the plaintiffs.

The deed to Peck and Simmons not champertous.

We now reach the principal and most important question in the case, namely, whether the deed dated the 20th of October, 1891, and executed by Caldwell E. Smith et al., parties of the first part, to the plaintiffs, Peck and Simmons, parties of the second part, was champertous. This deed in its premises sets forth that—

> "Whereas Ann Bartlett (whose husband, John L. Bartlett, died September 24, 1884) died intestate, seized in fee of certain real estate situated in the District of Columbia, leaving as her only heirs Annie L. Peck and James L. Bartlett, her children; and James M. Smith, Caldwell E. Smith, Ann Elizabeth Friar, Belle Lingan Cox, parties hereto, and Mary Smith Alston, now deceased, children of her daughter Mary C. Smith," etc.,

proceeding to recite the present heirs of said Ann Bartlett.

> "And whereas the parties hereto believing it to be for their interest and convenience to do so, have agreed to execute these presents. Now, therefore, this indenture witnesseth that the said parties of the first part, for and in consideration of the sum of five dollars in lawful money, &c., have granted, bargained, sold, &c., all the real estate of said Ann Bartlett, of which she died seized, situate, lying, and being in the District of Columbia, whether in possession, remainder, or reversion, or to which she was in any manner entitled, and which has come down in any manner from or through the said Ann Bartlett, deceased, to the said parties hereto of the first part, more especially the land conveyed to said Ann Bartlett by William A. Bradley, trustee, by deed of

November 8th, 1828, recorded in liber, &c., together with all the improvements, ways, easements, &c., to have and to hold the said land and premises and appurtenances unto and to the use of the said parties of the second part, their heirs and assigns forever."

The deed then proceeds to declare the trusts upon which the conveyance is made, and, as it is that part of the instrument which is assailed, it is perhaps important to set it out at length with that portion *in italics* upon which stress is laid by the defendant, it being contended that it is a champertous agreement.

"In trust, nevertheless, to and for the following uses and purposes, namely, to take and hold possession of the said real estate, and to institute and prosecute to a final conclusion in their own names any and every action, suit, or proceeding in law, and in equity, or otherwise, however, for the possession of said real estate, if in their judgment expedient, and to compromise, pay for, and purchase any outstanding claim or title against said real estate, if in their judgment expedient, and generally to do any and everything in their judgment expedient, which may be necessary to vest in them a perfect and unencumbered title in fee simple to and the recovery of possession of said real estate, and upon the vesting in them of a perfect and unencumbered title in fee simple, and the recovery of the possession of said real estate, or before and without the same, and without such proceedings, acts, and doings as they may think best, and at any time to sell and convey said real estate, or any part thereof, in fee simple or in any quantity of estate or estates to any person or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned, and upon such sale to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase money *and out of the purchase moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture, that the said*

> *Leo Simmons, one of the trustees or parties of the second part, shall retain 33 1-3 per cent., or one-third, after paying all expenses, costs, and expenditures of the said parties of the second part, in the execution of this trust,* OUT OF THE SAME *and the other two-thirds or 66 2-3 per cent., of said purchase money, clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett, their heirs or assigns, according to their respective interest, and it is further understood between the parties to this indenture, that should Leo Simmons die after suit has been begun for the recovery of any said property, and before a settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."*

We submit that this deed is barren of any of the attributes of champerty, and is an altogether innocent conveyance by means of which the title previously outstanding in a large number of persons was centered in two trustees for the benefit of all the owners. To denounce it as vicious is to overturn the settled doctrines of all the courts of the country, including, we submit, those of the District of Columbia.

It is very doubtful if the statutes against champerty ever were in force in this country. Their purpose was early declared to be

> "to repress the practices of many, who, when they thought they had title or right to any land, for the furtherance of their pretended right conveyed their interest or some part thereof to great persons, and with their connivance did oppress the possessors."
>
> Slywright *vs.* Paige, 1 Leon, 167.

So this court has said

> "The ancient policy, which prevented the sale of pretended titles, and held the conveyance to a third person of lands held adversely at the time to be an act of maintenance, *was founded upon a state of society*

> *which does not exist in this country.* The repeated statutes which were passed in the reigns of Edward I and Edward III against champerty and maintenance, arose from the embarrassments which attended the administration of justice in those turbulent times, and from the dangerous influence and oppression of men in power."
>
> Cooper *vs.* Roberts, 20 How. 483.

And similar views have caused the rejection in many of the States of the doctrine that a deed by one out of possession is void, and induced the declaration that the statutes in question were never in force.

> Schaferman *vs.* O'Brien, 28 Md. 565.
> Cain *vs.* Monroe, 23 Ga. 82.
> Wright *vs.* Meek, 3 Greene, 472 (Iowa).
> 18 Ill. 449.
> Stoever *vs.* Whitman, 6 Binney, 416 (Pa.).
> Bentinck *vs.* Franklin, 38 Texas, 458.
> Vancourt *vs.* Moore, 26 Mo. 92.
> Lessee of Hall *vs.* Ashby, 9 Ohio, 96.

And this doctrine was expressly affirmed by the Court of Appeals of the District of Columbia in a case decided in 1894.

> Matthews *vs.* Hevner, 2 App. Cas. D. C. 349.

In a later case (Johnson *vs.* Van Wyck, 4 App. Cas. D. C. 294), where a deed made manifestly for gambling purposes, was held void as against public policy, the court still queried if the statutes against champerty were in force. The court (p. 315) accepted these as correct definitions of champerty.

> "The unlawful maintenance of a suit in consideration of an agreement to have a part of the thing in dispute."
>
> 1 Hawk. P. C. 545.
> Co. Litt. 368.

"A bargain to divide the land or thing in dispute on condition of his carrying it on at his own expense."

Stanley *vs.* Jones, 7 Bing. 369.

In reaching their conclusion, the court directed special attention to the fact that the attorney named in the deed there before them *had covenanted* to conduct the litigation at his own cost. In the case at bar that court, while admitting that the deed contains no *express covenant* that the grantees shall pay the costs of litigation, held that that was the necessary result of the contract, and reached this conclusion through a forced construction of the trust. The opinion is clearly counter to the decisions of this court.

In Roberts *vs.* Cooper, 20 How. 467, 483, which was an ejectment by Cooper, the defendant offered to prove that when Cooper obtained his deed from Bacon's trustee, the Minnesota Mining Co. was in possession under adverse claim of title, which *Cooper well knew;* that Cooper bought from Bacon, under an agreement that he should hold the land for a corporation known as the National Mining Co., all of whose stock was held by Bacon, and that with the deed Cooper should receive six-tenths of such stock; that Cooper purchased the stock and took such conveyance with full knowledge of the claims and occupancy of the Minnesota Mining Co., and with the *intention of prosecuting the title purchased by him by legal proceedings.* (See p. 482). This court held the evidence properly rejected. Surely that case was more extreme than is this. See also Traer *vs.* Clews, 115 U. S. 528, where this court said: "But when property is conveyed the fact that the grantee may be compelled to bring a suit to enforce his right to the property does not render the conveyance void."

The trusts of these grantees are: 1st, To recover the possession of the lands with or without suits at law, and thereafter, (or before if in their judgment advisable) to *sell the land* and convey to the purchasers. The "expenses, costs and

expenditures" of the grantees, incurred in the execution of the trust are then to be paid out of one-third part of the proceeds of sales, and the remainder of such one-third part of such proceeds is to be paid to one of the trustees as his compensation.

It is submitted that this does *not in principle differ in any way from McPherson* vs. *Cox, 96 U. S. 404,* where the agreement was that the land, when it should be recovered, should be sold, and five thousand dollars be paid the attorney *out of the proceeds.* In this case as in that, the attorneys—

> "did not agree to pay any of the costs, they did not agree to take any part of the land which was the subject of the suit for their compensation, nor did they agree to take anything but money."

The trusts to Peck and Simmons involved expenses for necessary surveys, for advertising and for conveyancing, all of which would most properly be paid from proceeds of sales.

In the opinion of the Court of Appeals the doctrine of Brown *vs.* Bigne, 21 Ore. 260, is assented to, that being a suit on a contract between Bigne, who was engaged in a necessary and meritorious lawsuit, and had no means with which to prosecute it, and Brown who furnished the necessary funds upon Bigne's agreement *to give him half the proceeds.* Held not champertous. Why that contract should be held innocent, and our deed condemned, is not apparent unless the court assumed that our suit is not "meritorious."

Some State decisions are as follows:

It was agreed that A should buy land at a sheriff's sale and convey a half interest to B, who should then bring suit for it *and pay half the costs*; Held—

> "Such a contract has no taint of champerty about it. Having a half interest in the land, it would have been right and proper that the plaintiff should contribute half the costs of suit."

Moore *vs.* Ring, 82 Mo. 468.

And see the case of Richardson *vs.* Rowland, Supreme Court of Connecticut; American Law Register, Vol. 14, No. 2, page 78 (new series); where the editor has supplemented the report with an excellent annotation.

The Supreme Court of Iowa, after stating the origin of the statutes against champerty and maintenance, and the conditions of society out of which they grew, said:

> "In modern times the doctrine has to a great extent yielded and the evils under a pure and firm administration of justice are little felt. Champerty and maintenance are now seldom mentioned as existing in fact or as producing any considerable mischief. In this country with wise and wholesome laws, enjoying as we do a political and social equality, which never can exist under the institutions of England, with the administration of justice alike accessible to the poor and to the rich, where oppression such as would give rise to maintenance and champerty in England, cannot exist, *it is almost impossible to conceive how a case of champerty or maintenance can occur.*"
>
> Wright *vs.* Meek, 3 Greene (Iowa), 484.

A decision in Texas is very strong. The facts were that in an action of trespass to try title the defendant offered to prove—

> "That plaintiff having no interest in the property in controversy had hunted up the supposed defect in the title of the defendant, and the supposed better title in said company (his grantor) upon which this suit is founded, and had of his own motion approached said company and obtained from them a deed thereto, upon consideration that he would institute and prosecute, *at his own costs*, suit for recovery thereof, and in event of success would pay to said company a part of its estimated value."

The testimony was rejected. On error the Supreme Court of the State affirmed the ruling, saying;

> "Whether the English statutes prohibiting common barratry, maintenance, and champerty have

> ever come to be regarded as a part of the common law of England *even in that country*, we think is somewhat doubtful. They have certainly not been so considered by the courts of this country, unless in the State of New York.'
>
> Bentinck *vs.* Franklin, 38 Texas, 458.

So in New York, Chancellor Walworth said;

> "I am prepared to say that all the absurd doctrines of maintenance that grew out of the statutes which might have been necessary in a semi-barbarous age were swept away by the recent revision of our law, and many of them had been virtually abrogated before that time."
>
> Mott *vs.* Small, 22 Wend. 405.

So in Arkansas it was held that an attorney may purchase of his client an interest in the suit in consideration of services rendered and to be rendered therein *and become bound for the costs* without champerty.

> Lytle *vs.* State, 17 Ark. 608.

In the case at bar there is no provision for the benefit of speculative outsiders, certificate holders, or gamblers in litigation as was the case in Johnson *vs.* Van Wyck. The only persons to be benefitted under the deed are the grantors, who assert themselves to be the heirs of Ann Bartlett, and claim to own the land, and Mr. Simmons, who was to be the active agent in the trust *and be paid for his services* out of the fund to be realized from sales. Search the whole face of this deed as critically as we may and not even *inferentially* is there to be found a covenant or agreement on the part of Simmons to advance from his private means a single dollar (although, as we have seen, he might well have agreed to do so, without invalidating it), much less is there any agreement to *indemnify* the heirs against the payment of costs and expenses, should the purposes of the trust prove abortive by reason of a failure to establish their title to the land.

To test this let us consider a moment what Mr. Simmons' rights against the heirs would have been had he advanced from his own means the money necessary to purchase the outstanding claim of one of the adverse claimants. By the terms of the deed the trustees, not Simmons *alone*, are authorized, *inter alia*, to "pay for and purchase any outstanding claim or title against said real estate." For whose benefit was this purchase to be made? For the benefit of the trustees? No; for the benefit of the *cestuis que trustent*—"in trust for the grantors." Whose duty, under the terms of the trust, was it to furnish the money to make this purchase? Certainly when a party directs a thing to be purchased for his benefit, it is to be presumed, in the absence of express language, that he is to furnish the money necessary for the purchase, or if the money should be *advanced* for him by either of the trustees the trustee so doing would have a right of action against his *cestui que trust* should he be unable to sell the property for an amount equal to the sum advanced, upon the implied promise that such sum would be refunded; money paid upon request, express or implied, can always be recovered. Simmons clearly has this right of action against the *cestui que trust* so far as there is nothing in the deed to the contrary. We shall examine this deed in vain for any language, or provision, which would prevent such recovery.

It will no doubt be urged that this contract, like that in Johnson *vs.* Van Wyck, is contrary to public policy, but on what principle it is difficult to conjecture if the language of the deed be observed. To condemn a contract on this ground an unquestionable case should be made out, for, as was said by Burrough, J. (Richards *vs.* Mellish, 2 Bing. 229), public policy—

> "is a very unruly horse, and when once you get astride it, you never know where it will carry you—it may lead you from the sound law."

It is also submitted that under familiar rules the court should not hold this deed to be vicious unless clearly satisfied that it is not capable of other construction; for if effect may be given the deed by *any reasonable construction* that construction should be adopted; all presumptions are in favor of the validity of the conveyance.

Bender *vs.* Fromberger, 4 Dall. 436, 440.
Foxcroft *vs.* Mallett, 4 How. 353, 376.

> "The rule of law is that all grants are to be taken most strongly against the grantor, unless in the case of the King," and liberally in favor of the grantee.
>
> Bish. on Contr., Sec. 414.
> Blackst. Com., Book II, p. 121.

The Rule in Deery vs. Cray, 5 Wallace, 795.

The plaintiffs below *having announced to the court that they proposed to show that Ann Bartlett was the common source of title both of the plaintiffs and defendant*, began their proof by showing a deed from one William A. Bradley to said Ann Bartlett, and then, having offered evidence tending to show that she had died intestate, and that the persons named as grantors in the deed to Peck and Simmons were her heirs at law, offered in evidence this deed from them to Peck and Simmons, which, as has been seen, was ruled out. When the court announced its ruling plaintiffs' counsel stated that it was useless to go on without this deed, and, having excepted to the court's ruling, abandoned the now useless effort to establish a common source, and as they had no other proof of title, rested their case.

It is contended now by the defendant that even if the court was wrong in ruling out the very foundation of our case yet we should have gone on and offered the rest of our *proof*, which was plainly under the ruling of the court *irrelevant* and *immaterial* unless it could have been con-

nected with this deed, which we were not permitted to prove. We could not establish our case without this deed. It was the *sine qua non* of our case. To have gone on with the offer of other deeds would have been a waste of the time of the court. We could not show the *only title which we had undertaken to show*, to wit, a common source, unless this deed were admitted in evidence. Our claim was, that with this deed in evidence the defendant would be estopped to deny our title of record. Now it is said that we should nevertheless have offered other proofs of title; but we had no other proof of title without this deed to the plaintiff. Suppose we had said to the court:

Notwithstanding it is impossible for us to prove our title, under your ruling, we propose to go on and occupy the time of the court in offering evidence which we are obliged to admit establishes nothing without this deed.

The court could very properly have replied:

> "We are not sitting to receive irrelevant testimony. This testimony which you propose to offer is irrelevant without this deed, and we must rule it inadmissible."

This was practically what this court said in *Deery vs. Gray, 5 Wall. 795*. That was an action of ejectment brought in the Circuit Court for the Southern District of Maryland. A deed had been offered in evidence which was the very foundation of the plaintiff's case. This deed contained certain *recitals*, the truth of which was necessary to be established before the deed could be available as part of plaintiff's title. All this proof was ruled out, together with the deed, by the court below. Defendant then offered in evidence a deed which showed on its face that plaintiff's ancestor had parted with the title to the land now claimed, and of course, if the deed were *genuine*, would have defeated plaintiff's case, even if the deed offered by plaintiff had been admitted in evidence. Plaintiff offered no proof whatever to impeach the defendant's deed, but satisfied herself with objecting to it

on the ground that it was defectively acknowledged. Two exceptions taken to the ruling of the court below, and which were the only ones considered by this court, were: 1st. To the refusal of the court to admit in evidence the plaintiff's deed; and, 2d. To the admission in evidence of the defendant's deed. This court held, as to the first, that the plaintiff's deed should have been admitted, and as to the second, that the defendant's deed was valid and properly admitted. Then the court, by Mr. Justice Miller, said (p. 807):

> "It is claimed that, if we shall find this [the defendant's] deed to be valid, we must affirm the judgment, although we may find error in the previous rulings of the court, upon the ground that this conveyance shows that plaintiff has no title to the land, and therefore such error is without prejudice to her rights. We concede that it is a sound principle that no judgment should be reversed in a court of error when the error complained of works no injury to the party against whom the ruling was made. But whenever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights."
>
> "In the case before us this is not so clear. The plaintiff, by reason of the error of the court, *had never been permitted to introduce the first step in the proof of her case.* She had no interest in offering to show anything which might avoid the force of the deed read by defendant. If she could have proved it a forgery *it would have done her no good in this suit, because she had failed, under the erroneous ruling of the court, to make out a prima facie case for herself.* **We cannot assume that she might not have successfully avoided the effect of that deed, if the court had given her a standing in the case which would have made it avail her to do so."**

This is precisely the position of the plaintiffs in the case at bar. This court "cannot assume" that we would not

have been able to show the rest of our common source of title "if the court had given us a standing in the case which would have made it avail us to do so."

This doctrine, that where there is error in the record this court will direct a reversal, unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party complaining, has been laid down frequently by this court.

Thus in Smith *vs.* Shoemaker, 17 Wall. 639, it is said:

> "We repeat the doctrine of this court laid down in Deery *vs.* Cray that while it is a sound principle that no judgment should be reversed on error when the error complained of worked no injury to the party against whom the ruling was made, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the right of the party."

Vicksburg and Reading RR. Co. *vs.* O'Brien, 119 U. S. 99.

Moses *vs.* Nat. Bank, 104 U. S. 625.

Gilmer *vs.* Higby, 110 U. S. 50.

Respectfully submitted.

FRANKLIN H. MACKEY,
ARTHUR A. BIRNEY,
For Plaintiffs in Error.

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Supreme Court of the United States

OCTOBER TERM, 1896.

No. 289.

E. J. PECK AND LEO SIMMONS, PLAINTIFFS IN ERROR,

vs.

CHRISTIAN HEURICH.

Brief and Argument for Defendant in Error.

W. F. MATTINGLY,
LEON TOBRINER,
For Defendants in Error.

LAW REPORTER PRINT.

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OCTOBER TERM, 1896.

No. 289.

E. J. PECK AND LEO SIMMONS, PLAINTIFFS IN ERROR,

vs.

CHRISTIAN HEURICH.

Brief and Argument for Defendant in Error.

This is one of a series of twenty odd suits in ejectment instituted by the plaintiffs in error to recover various portions of a tract of land of forty-six (46) acres, situate in the District of Columbia (R. 14).

At the trial of the case, the plaintiffs offered in evidence a deed from one William A. Bradley to Ann Bartlett, dated November 8, 1828, purporting to convey the whole tract of forty-six acres, and having adduced evidence tending to prove who the heirs of said Bartlett were, offered in evidence the record copies of three certain deeds from such alleged heirs to the plaintiffs. Upon defendant's objection these deeds were excluded, and the plaintiffs, having excepted to this ruling of the court, then rested their case, whereupon the court instructed the jury to return a verdict for the defendant. Upon appeal to the Court of Appeals of the District of Columbia from the judgment rendered upon this verdict, that court affirmed the judgment of the court below (6 App. Cas. D. C. 273). The case is here upon writ of error to the Court of Appeals.

It will be seen that no attempt was made by the plaintiffs

in error to deduce any title from the United States or the State of Maryland, nor was there any offer to do so, nor any evidence showing that the defendant was in possession of the premises in controversy. True it is that the plaintiffs during the trial announced to the court that they proposed to show that the plaintiffs and defendant traced their respective title to the land in controversy from a common source, but as will appear from an inspection of the record (page 3), this fact was denied by the defendant and no evidence showing a common source was offered. In fact there was no proof, nor offer of proof, to establish plaintiffs' title whatsoever.

Upon this condition of the record two questions present themselves:

First. Whether upon the case made by plaintiffs the exclusion of the three deeds operated to their prejudice.

Second. Whether upon the whole case the court was not justified in instructing the jury to return a verdict for the defendant.

Upon the case made by plaintiffs, the exclusion of the deeds did not prejudice them, and the court did not err in directing a verdict for defendant.

In the District of Columbia all titles to real estate are derived from the United States or the State of Maryland, and it has invariably been held and it is a general principle of ejectment law, that the plaintiff must show that he has *a legal title* to the land and a right of possession and he cannot establish such legal right in himself without first showing that the land has been granted by the State.

Mitchell *vs.* Mitchell, 1 Md. 52.
Cockey *vs.* Smith, 3 Har. & J. 26.
Anderson *vs.* Smith, 2 Mky. 279.

In Mitchell *vs.* Mitchell, *supra*, the court says:

> "The general principles of ejectment law in Maryland have been settled by a long series of unvarying decisions and cannot be disturbed by this court, however hard may be their operation in particular cases. Among these is that the plaintiff must recover, if at all, on the strength of his own title, and cannot do so because of the weakness of that of the defendant. Another is that he must show that he has the *legal* title to the land *and* a right of possession, *and that he cannot establish such legal right in himself without first showing the land has been granted by the State.* The cases in Hall *vs.* Gittings, 2 H. & J. 125; Wilson *vs.* Inloes, 11 G. & J. 358, and Cockey *vs.* Smith, 3 H. & J. 26, are full on these points. They merely affirm what has always been the law of Maryland."

Anderson *vs.* Smith, *supra*, is to the same effect.

The plaintiff must also show that the defendant was in possession at the time of the institution of the suit.

Tyler on Ejectment, 471, 472.
Sedgewick and Wait on Tr. of Title to Land, Sec. 236.
3 Wait's Act and Def. 24.
Hastings *vs.* Dollarhide, 24 Cal. 195.
Philbrick *vs.* Goodwin, 7 Black, 18.
Anderson *vs.* Smith, 2 Mky. 284.

The exception to the rule requiring the defendant in ejectment to trace his title from the State is where both the plaintiff and defendant claim title from a common source. But the fact of a common source must be proved, like any other fact in the case, or be conceded by the defendant; the mere declaration of plaintiff's counsel that such a common source exists or is claimed, especially when it is met by a denial from the defendant, does not take the place of, or operate as, proof.

It will be contended by plaintiffs in error that under the ruling of the court in excluding the deeds, further proof of

their title would have been useless and unavailing, and consequently unnecessary, but we submit that it was incumbent on plaintiffs to prove, or offer to prove, a *prima facie* case for the purpose, if for no other, of enabling the trial court to determine the materiality of the evidence, and the appellate court to determine whether plaintiffs were prejudiced by the alleged error; that if the practice sought to be justified herein is established, it will result in permitting a case to be tried on the "instalment plan," and upon the exclusion of any alleged important, or material evidence, permit an appeal and a separate hearing upon and for each and every question which may arise in the course of the litigation.

How is it to be ascertained in this case, upon the showing made by them, that plaintiffs in error were prejudiced by the refusal of the court to admit in evidence the three deeds? Is the representation of counsel that the continuity of plaintiffs' chain of title is broken by such refusal to take the place of evidence from which the court can deduce such a conclusion? How does it appear that if plaintiffs had been permitted to give in evidence the deeds, they would have been entitled to recover? What is the title of the plaintiffs in error to the property in controversy? What proof thereof is made?

If plaintiffs had no other proof of title than that which they offered, they most assuredly could not have recovered, and is it not to be assumed, in the absence of all offers of additional proof, that all the evidence of their title was submitted? Is the court to assume that plaintiffs had other and additional evidence upon which, in connection with the rejected evidence, they could have recovered?

These inquiries are suggested by reason of the practice which plaintiffs now seek to establish, and which, if sanctioned, will be applicable not alone to suits in ejectment, but to all classes of cases.

In this connection we submit, that the opinion of the court

below (R., pp. 21-22) is a fair and reasonable presentation of the rule which should be applied to this phase of the case at bar.

The Rule in Deery *vs.* Cray, 5 Wall. 795.

Counsel for plaintiffs in error apparently conceiving the propositions hereinbefore made to be sound, seek to avoid the same by the authority of the above case.

We, however, submit that the Deery case actually supports our contention.

In that case the plaintiff undertook to offer in evidence a complete chain of title from the State down to one Brent, and then offered in evidence a deed from his executors, and one heir at law, without making any proof of the will under which they professed to act, or the fact of heirship, other than the recitals in the deed. For want of such proof the court rejected the deed. Upon such rejection the plaintiff offered all the evidence necessary *to make a prima facie case*, to entitle her to recover, had the rejected deed been admitted in evidence, and (we quote from the statement of the case.

> "All this being finally offered with the deed, they were rejected by the court, to which rejection an exception—the fourth one in the case—was taken."

In the progress of the case some *of the defendants* offered in evidence a deed from the plaintiff's mother, as whose heir-at-law, plaintiff claimed, and which if admitted was apparently destructive of plaintiff's claim. This deed was admitted, over the objection of plaintiff, her objections being based upon the alleged defective acknowledgment thereto.

The court in its opinion after holding that there was error in rejecting the deed from the executors of Brent, says:

> "It is claimed that, if we shall find this deed to be valid we must affirm the judgment, although we may find error in the previous rulings of the court,

> upon the ground that this conveyance shows that plaintiff has no title to the land, and that therefore such error is without prejudice to her rights."

And then conceding the rule to be that there should be no reversal where it is clear that the error complained of could not have prejudiced the party's rights, the court says that such fact is not so clear in the case, because the plaintiff had no interest in offering evidence which might avoid the deed introduced *by the defendants*, as under the rulings of the court, in excluding one of her links of title she could not have recovered, had she even succeeded in so avoiding the deed.

It is manifestly clear that in the Deery case the plaintiff should, upon a reversal, have had the opportunity of meeting and if possible overcoming the deed from her mother; it was unnecessary for her to attempt this on the first trial of the case; in fact we can see no reason *why defendants should have introduced the deed*, under the trial court's rulings, unless it was for the purpose of obtaining the opinion of this court (which it seems they did) upon the validity of plaintiff's objections to it, for the validity of that deed seems to have been the turning point in the case.

But the case at bar does not present such a condition. The plaintiffs in error *did not make a prima facie case*; they proved no title whatsoever; they however say (Pltff's Brief, 18):

> "We could not show the only title which we had undertaken to show—to wit, a common source—unless this deed were admitted in evidence. Our claim was that with this deed in evidence the defendants would be estopped to deny our title of record. Now, it is said that we should nevertheless have offered other proofs of title; but we had no other proof of title without this deed to the plaintiff."

We are at a loss to see how the deeds in controversy would have been evidence of a common source of title, unless this

court will assume, in the absence of proof in the record to that effect, that they establish such a common source.

In the Deery case the court was asked to assume a negative, to wit, that plaintiff *could not* avoid the *deed*. In this case plaintiffs in error ask the court to assume an affirmative to wit, *that they had a good title*, the very fact which it was necessary for them to establish, and their only excuse for not making profert of their evidence is that it "would have been a waste of the time of the court."

As to the Deeds.

The plaintiffs sought to offer in evidence the *record copies* of three deeds, the second and third thereof are merely ancillary to the first, which seeks to convey the property in controversy to the plaintiffs upon the following trust:

> "In trust nevertheless, to and for the following uses and purposes, namely: to take and hold possession of the said real estate, *and to institute and prosecute to*, a final conclusion in their own names any and every action suit or proceeding in law, and in equity, or otherwise, however, for the possession of said real estate, if in their judgment expedient, and to compromise, pay for, and purchase any outstanding claim or title against said real estate, if in their judgment expedient and generally to do any and everything in their judgment expedient, which may be necessary to vest in them a perfect and unencumbered title in fee simple to *and the recovery of possession of said real estate*, and upon the vesting in them of a perfect and unencumbered title in fee simple, and the recovery of the possession of said real estate *or before and without the same, and without such proceedings, acts and doings as they may think best*, and at any time to sell and convey said real estate, or any part thereof, in fee simple or in any quantity of estate or estates to any person or persons, and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned and upon such sale or sales to

convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase-money *and out of the purchase-moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture, that the said Leo Simmons, one of the trustees or parties of the second part, shall retain 33⅓ per cent., or one-third, after paying all expenses, costs and expenditures of the said parties of the second part, in the execution of this trust, out of the same,* and the other two-thirds, or 66⅔ per cent., of said purchase-money, *clear of any cost or charges whatever, to pay the heirs of said Ann Bartlett* their heirs or assigns according to their respective interest, and it is further understood between the parties to this indenture, *that should Leo Simmons die after suit has been begun* for the recovery of any said property, and before a settlement shall have been made, then in that case, the court having jurisdiction shall appoint a trustee to act in his stead *and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures.*"

This deed, which bears date *October twentieth (20), 1891*, has attached certificates as to the official character of the officers taking some of the acknowledgments to it, dated as late as *October tenth (10), 1892*, and was recorded with the other two deeds *November twenty-third (23), 1892.*

This suit was instituted *September 10th, 1892.* The deeds were recorded subsequent to the bringing of the action.

It is submitted that record copies of these deeds are not admissible.

First. Because the deeds were not of record at the time of the institution of this suit, being recorded more than two months subsequent thereto, and that consequently plaintiffs had no title at the time of bringing their action.

Second. Because they were not recorded within six months from their dates.

Third. Because the deeds being immediately to the plaintiffs the originals should have been produced, or the foundation for the introduction of secondary evidence been laid.

Fourth. Because the deeds are clearly champertous, and consequently void.

I and II.

The exclusion of the record copies, because the originals were not recorded before the institution of the action.

If for the purpose of making proof of, and at the same time avoiding the production of an original deed, which is materially necessary to a plaintiff's recovery, and which if produced, would, because of erasures and interlineations or other reasons not apparent from an inspection of the record copy, be excluded, a plaintiff can delay its registration until after the institution of his suit; there is no rule which prevents him from waiting until the day of trial; then placing upon record, in the nature of a surprise, the conveyances, under which he claims, offer the record copies in evidence; thereby obtain evidence of a "clean record" and prevent an inspection of the original deeds. No practice could be devised which would operate more harshly, unjustly and expose a system of registration, weak as it is, to more abuse, and fraudulent practices, than the practice which plaintiffs in error seek to have justified.

The plaintiffs in error did not offer, or undertake to offer, in evidence, the original deeds, the question was and is, upon *the admissibility of the record copies.*

This raises the question, when does a deed of real estate become effective to pass title, and whether registration of it is necessary in the District?

The various acts of Maryland and Congress, providing

for, and regulating the registration of deeds in the District of Columbia, are as follows:

Maryland Act 1715, Chap. 47, Sec. 8, 1 Kilty's Laws of Md.

Maryland Act 1766, Chap. 14, Secs. 1, 2, Kilty's Laws of Md.

Maryland Act 1791, Sec. 8, Chap. 45, 2 Kilty's Laws of Md.

Act of Congress, Feby. 27, 1801, Chap. 15, Secs. 1, 2, St. at Lge. 103–4.

Act of Congress, May 31, 1832, 4 St. at Lge. 521.

Act of Congress, April 20, 1838, 5 St. at Lge. 227.

Act of Congress, March 3, 1865, 13 St. at Lge. 531.

Act of Congress, April 29, 1878, 20 St. at Lge. 39.

As will be seen, the Act of Maryland of 1791 was the act regulating the registration of deeds in force at the time of the cession of the District of Columbia. Section 8, chapter 45, thereof, provided, among others—

> "that no deed hereafter to be made of or for lands within that part of the said territory which lies within this State, *shall operate as a legal conveyance*, nor shall any lease for more than seven years be effectual, unless the deed shall have been acknowledged as aforesaid, and delivered to the said clerk *to be recorded within six calendar months* from the date thereof."

This act made it necessary to the validity of a deed, even as between the parties themselves, that it should be recorded within six months from its date, otherwise it passed no title.

The Acts of Congress May 31, 1832, and April 20, 1838, were incorporated in Sections 446 and 447 of the Revised Statutes of the United States relating to the District of Columbia. Section 446 provided as follows:

> "All deeds, except deeds of trust and mortgages, which are acknowledged or proved, and certified, according to law, and delivered to the recorder of

> deeds for record within six months after the sealing and delivery thereof, shall take effect and be valid as to all persons from the time of such acknowledgment or proof."

Section 447 that—

> "All deeds of trust and mortgages, whenever delivered to the recorder of deeds for record, and all other conveyances, covenants, agreements, and deeds, which shall not be acknowledged, proved, or certified, and delivered to the recorder for record within six months after the sealing and delivery thereof, shall take effect and be valid, as to all subsequent purchasers for valuable consideration, without notice, and as to all creditors, from the time when such deed of trust or mortgage, or other conveyance, covenant, agreement, or deed, shall have been so acknowledged, proved, or certified, and delivered to the recorder for record, and from that time only."

By Section 464 of the acts 1832 and 1838, incorporated as aforesaid, are to be taken and considered as cumulative with the acts of Maryland on the same subject in force in the District of Columbia at the passage thereof.

Subsequently, by Act of April 29, 1878 (20 St. Lge. 39), Richardson Supp. R. S. U. S., 2d Ed. 158, Sections 446 and 447 were repealed, and in lieu thereof it was provided that—

> "all deeds, deeds of trust, mortgages, conveyances, covenants, agreements, or any instrument of writing which by law is entitled to be recorded in the office of the recorder of deeds, shall take effect and be valid *as to creditors and as to subsequent purchasers for valuable consideration*, without notice, from the time that such deed, deed of trust, mortgage, conveyance, covenant or agreement or instrument in writing shall, after having been acknowledged, proved or certified, as the case may be, be delivered to the recorder of deeds for record, and from that time only."

As will be observed, this act merely provides for the recording of a deed, as against "creditors and subsequent purchasers for valuable consideration without notice," making no provision whatsoever as to the effect record shall have upon strangers or persons who do not come within the category or description of the two classes mentioned.

The only act which does so provide is the Act of Maryland of 1791. This, we submit, has not been expressly or impliedly repealed, and operates upon all conveyances not within the provisions of the Act of April, 1878.

But registration of the deeds was necessary to pass the title and interest of the femes covert grantors.

The principle deed in question purports to be executed by some seven married women, who either convey their individual interest as alleged heirs at law, or release dower interests.

Sections 450 and 452 of the Rev. St. U. S., relating to this District adopting the provisions of the Acts of 1832 and 1838, referred to, provide:

> § 450. "When any married woman shall be a party executing a deed for the conveyance of real estate or interest therein, and shall only be relinquishing her right of dower, *or when she shall be a party with her husband to any deed*, it shall be the duty of the officer authorized to take acknowledgments, before whom she may appear, to examine her privily and apart from her husband, and to explain to her the deed fully." (Sec. 451 prescribes the form of certificate).
>
> § 452. "*When* the privy examination, acknowledgment and declaration of a married woman is taken and certified *and delivered to the Recorder of Deeds for record in accordance with the provisions of this chapter*, the deed shall be as effectual in law as if she had been an unmarried woman, but no covenant contained in the deed shall in any manner operate upon his or her heirs, further than to convey effectually

> her right of dower or other interest in the real estate which she may have at the date of deed."

Under these sections the deeds only became effective when certain conditions had been complied with, among others, "when *delivered to the Recorder of Deeds for record in accordance* with the provisions of this chapter."

Again, a deed is presumed to be complete before delivery. The principal deed was not complete until October 10, 1892. The presumption is, that it was not delivered until after that time.

If the deeds only took effect from the time they were complete for delivery or from date of record, it is apparent that plaintiffs in error had no title at the time of the institution of their suit, and title and right of possession acquired after the commencement of the action will not authorize a recovery in ejectment.

> Sedgwick & Waits' Trial of Title to Land, Sec. 185 and 792.
>
> Goodman *vs.* Winter, 64 Ala., at 437.
>
> Alden *vs.* Grove, 18 Pa. St., at 385.
>
> Litchfield *vs.* RR. Co. 7 Wall., at 272.
>
> McCool *vs.* Smith, 1 Black., at 470.

The plaintiffs allege a title as of August 1, 1892. Says the court in Smith *vs.* McCann, 24 How. 403:

> "The lessor of the plaintiff must show a legal title in himself to the land he claims, and the right of possession under it, *at the time of the demise laid in the declaration and at the time of the trial.*"

To enable the plaintiffs to recover—

> "it was essential that they should be clothed with the legal title and the right of possession *at the time the action was instituted.*"
>
> Wilson *vs.* Inloes, 11 Gill & John. 358.
>
> Hollingsworth *vs.* Flint, 101 U. S. 591–596.

Another objection to the record copies we state as follows: Sections 450 and 452 require enrollment of a deed executed by a married woman, whether to pass dower or other interest. Section 443 provides:

> "When acknowledgments are made *beyond the limits of the District* within the United States, the certificate of the same shall be accompanied by a certificate of the register, clerk, or other public officer having cognizance of the fact under his official seal, that at the date of the acknowledgment the officer taking the same was, in fact, the officer he purported to be."

Under the provisions of Section 440 a deed is not entitled to enrollment unless it is "*executed, acknowledged,* and *certified,*" in conformity with requirements of Chapter 14 of our Revised Statutes. Enrollment of a deed executed by a married woman being necessary to its validity, all those conditions required by the statute to entitle it to registration must be complied with before a deed can be admitted to record; the principal deed was not entitled to enrollment until after October the 10th, 1892, the date of the certificate of the official character of the officer who took the acknowledgment of Kate J. Griswold and George Griswold, her husband, at New Orleans, Louisiana. The case of Hollingsworth *vs.* Flint, 101 U. S. 591 is, we submit, in point.

In that case the court held that the grantor being a married woman—

> "she could not, under the laws of Texas be divested (of her interest), except by the conveyance of herself and her husband and after her privy examination before the proper officer"—

and that such examination had not taken place when the action was commenced, so that the plaintiff therein, at the time of the institution of his suit, had no title and consequently could not recover. The facts in this case are exactly similar. The certificate as to the *official character* of the officer taking Mr. and Mrs. Griswold's acknowledgment and

certifying to her privy examination *was just as material under our statute as the certificate of the privy examination itself*, and until it had been obtained and annexed to the deed as required by the statute so as to permit its registration, the deed itself *was not entitled to record* and insufficient and of no effect to pass her interest.

Rodgers *vs.* Caywood, 1 Swan (Tenn), 142.
Elwood *vs.* Flannigan, 104 U. S. 562, 567.

III.

The deeds being immediately to plaintiffs, the originals should have been produced or a foundation for the introduction of secondary evidence, been laid.

The general rule is that a party relying on a deed made immediately to himself or the other party must produce the original deed, or lay a foundation in the usual manner for the introduction of secondary evidence.

This rule prevails in the District and is applicable to the case at bar.

The question was considered by this court in Brooks *vs.* Marbury, 11 Wheat. 78–82, where the court said:

> "Should the act of 1729 be considered as applying to this case, the question would then arise, whether the copy of a deed be admissible where the original is in the power of the party offering the copy. This would be contrary to the great principle that the best evidence which the nature of the case admits of ought to be required. But it has been said, in answer to this objection, that the courts of Maryland have so decided. This court will certainly respect the decisions made in the State; but we are not satisfied that the principle is settled. In the case cited from 6 Harris and Johnson, 234, the question arose on the conclusiveness, not on the admissibility of the evidence. The suit was on an administrator's bond, and Mr. McGruder said, in argument, that 'the law requires such a suit to be brought on a copy of the

bond. Of course such copy must be admissible. It is true that, in deciding against its conclusiveness, the court said, generally, that a copy is *prima facie* evidence in all cases where the law directs an instrument of writing to be recorded. This is an assertion of a general principle, not the construction of a particular act, and we understand that the courts of Maryland have not adhered uniformly to the principle thus laid down. There is some contrariety of opinion on this point; but the majority of the court conceives that *the copy should not have been read, without showing that the original was not in the power of the party.*"

This proposition is also supported in Keller *vs.* Ashford, 133 U. S. 610, 618.

"Nor can the objection of the defendant that the original deed from Thompson to Ashford was not produced or its execution proved be sustained. The deed is admitted to have been duly recorded. There is no presumption that it was in *the possession of the plaintiff, who was not a party to it*; but it is to be presumed to have been in the possession either of Ashford, the grantee named in the deed, or of Kelly, who procured the deed to be made, and to whom it was originally delivered. Both of them having failed to produce it *upon notice to do so*, the recorder's copy was competent and sufficient evidence of the contents of the deed, as between the parties to this suit."

In Bowser *vs.* Warren, 4 Blackf. 522, 527:

"It remains to answer the inquiry, whether the acknowledgment and recording of the deed made other proof of its execution necessary. The cases respecting the admissibility of the record or registry of deeds, or the copies of them, without accounting for the absence of the originals or proving the execution, are very numerous and not at all uniform. From the general view of the authorities, we consider the rule of evidence most conducive to convenience in practice, and to the security of titles (excepting, perhaps, some cases of fraud) to be, that

> when a deed has been regularly admitted to record in the recorder's office, and is relied upon by a suitor not a party to it, and who cannot be presumed, from the nature of the conveyance, to have the custody or control of the instrument, the record, or a copy of it, is *prima facie* evidence, and proves the execution of the deed without further testimony; but if the deed *is made to the party who relies upon it*, it may be presumed from its character to be in his keeping, or under his control, the original must be produced, if not lost or destroyed, and its execution proved.
>
> "A deed duly acknowledged and recorded comes within this rule, and is *prima facie* evidence without further proof of its execution, whenever the recorder's record, or a copy of it, would be evidence without the production of the original, and without explaining its absence. Jackson *vs.* Schoonmaker, 4 Johns. 161; Eaton *vs.* Campbell, 7 Pick. 10; Scanlan *vs.* Wright, 13 Id. 523. The deed in this case was made immediately to the party who produced it; he was therefore bound to prove its execution, as if it had never been acknowledged and recorded. Its admission was erroneous."

So in Samuels *vs.* Borrowscale, 104 Mass. 207, 209. The rule is laid down by Gray, J., to be:

> "The law is well settled in this commonwealth, that a party relying on a deed *made immediately to himself* or the other party, or which is presumed to be in the custody of either, must produce the original deed, or lay a foundation in the usual manner for secondary evidence; but that of other deeds, acknowledged and recorded in accordance with the statutes, a certified copy from the registry is original evidence, instead of the deed itself, and of course dispenses with calling an attesting witness or other proof of execution."

To the same effect are—

Draper *vs.* Hatfield, 124 Mass. 53, 56.

Farrar *vs.* Fessenden, 39 N. H. 268, 278.

Bolton *vs.* Cummings, 25 Conn. 410, 421.
Fryer *vs.* Dennis, 2 Ala. 144, 148.
Ackley *vs.* Sexton, 24 Iowa, 320, 321.
Peck *vs.* Clark, 18 Tex. 239, 241.

And the court is respectfully referred to the comments of the court below upon this objection (Rec. 20), viz:

> "It is a peculiar fact in this connection, although perhaps not important, in the view which we take of the case, that the paper offered in evidence by the plaintiffs was not the original deed, although that must have been in their possession, but the transcript from the land records of the District of Columbia."

In discussing these various objections, counsel for plaintiffs in error finally suggest that at the most they only affect the interest of Mrs. Griswold. We, however, submit that they affect the interest attempted to be conveyed by every feme covert grantor, and also the admissibility of the record copies. The objection we urge under this head are:

First. To the sufficiency of the deeds to pass the title of these grantors *until they were enrolled.*

Second. To the admissibility of the record copies in that the deeds were not entitled to registration because of the failure to comply with the provisions providing for their registration and that if they were therefore not entitled to record, although they may have been actually enrolled, their record copies are not admissible.

Finally the question is disposed of by the admission of counsel for plaintiffs in error when they submit that—

> "*it was not necessary to record the deeds at all,* except as a precaution against subsequent purchasers for value, and it is not contended that the defendant is such." (Plffs. Brief, p. 6.)

If this proposition be a correct statement of the law; if it be true that there is no law *requiring* the registration of a

deed for real estate in the District, except as against creditors and subsequent bona fide purchasers for value, and that these deeds were not *required by law* to be recorded, then most assuredly *their record copies* were inadmissible:

> "For the record of an instrument which either the law *does not require* or *authorize* to be recorded, or which is not authorized to be recorded by reason of *the failure to observe the prescribed requisites* for registration, will not be received in evidence in lieu of the original."
>
> Cheney *vs.* Watkins, 1 H. & J. 527–532.
> Connelly *vs.* Bowie, 6 H. & J. 141–144.
> Coale *vs.* Harrington, 7 H. & J. 147–155.
> Burgess *vs.* Lloyd, 7 Md. 178–201.
> Brooks *vs.* Marbury, 11 Wheat. 78–81.
> 20 Am. & Eng. Ency. L. 602, and authorities cited in note 3.

There is no statutory provision in force in this District which authorizes the record copy of a deed to be primarily admissible in evidence, and if the contention of plaintiffs in error, that enrollment of the deeds in question was not *required by law*, be correct it was not error to exclude the record copies.

The Deeds are Champertous.

The law against champerty, and the doctrine that when a deed is clearly champertous, it is void, prevails in the District of Columbia.

> Stanton *vs.* Haskins, 1 MacA. 558.
> Johnson *vs.* Van Wyck, 4 App. Cases D. C. 294.
> Matthews *vs.* Hevner, 4 App. Cases D. C. 380, 396.

The decisions in these cases are decisive of the law, so far as respects the District of Columbia.

The many and frequent transactions in the purchase and sale of real estate in the District of Columbia during the

last few years, the boom in real estate, and the consequent necessity of a clear, unincumbered and negotiable title afforded the opportunity for a great number of schemes to tie up real estate and cloud the title thereto, by placing upon record conveyances from parties claiming the title adversely to the record owners. The placing upon record of such a deed or conveyance easily resulted in the prevention of a sale, and the creation of a non-negotiable title. Of a large number of such schemes the one developed in the case of Johnson *vs.* Van Wyck, *supra*, was the most elaborate and audacious.

In a well-considered opinion the Court of Appeals of the District of Columbia holds that the law against champerty is in force in the District; that the scheme developed by the conveyance sought to be recovered under, is within the inhibition of said law, and that the conveyances are therefore null and void.

It is true that in that case there was an express covenant on the part of the trustee to carry on the litigation at his own expense, but we submit that the provisions contained in the deeds in this case are equivalent to such a covenant, and that the interpretation placed thereon by the court below is the true one.

That the courts of the District have been alive to this condition of titles, created for the purpose of litigation and that they regard them with suspicion and disfavor is evident by the expression of opinion in the case of Hevner *vs.* Matthews, 4 App. Cases D. C. 380, where plaintiff's ancestor, knowing that the property was held adversely, had procured the title under an agreement that he should pay for it $1,000 in cash and $4,000 additional (382).

> "When the title should be judicially determined to be in said Peter Hevner."

says the court (396):

> "We desire to add that we have not considered the effect upon this suit of the apparently champertous

> character of the contract between George C. Campbell and Peter Hevner under which the latter received his title to the property. While the assignments of error were broad enough to include that question, it was not argued before us."

Do the deeds under consideration come within the description of champertous contracts?

> "Champerty is the unlawful maintenance of a suit in consideration of an agreement to have a part of the thing in dispute."
>
> 1 Hawk P. C. 545.
>
> Co. Litt. 368.

It is also defined as "a bargain to divide the land or thing in dispute on condition of his carrying it on at his own expense."

> Stanley *vs.* Jones, 7 Bing. 369.
>
> Roberts *vs.* Cooper, 20 How. 467–484.

As will be seen from the record, the heirs at law of Ann Bartlett were first advised of any interest they might have in the property in controversy by one Leo Simmons, who instigated the execution of the deeds; who is one of the plaintiffs herein, and one of the attorneys prosecuting this action.

It was anticipated, that by reason of the cloud created by the deeds on the title to the tract, persons holding the various portions or parts thereof, would be inclined to buy off the claimants, and the trustees are consequently authorized *to sell and convey before or without having instituted the litigation in the deeds provided for.* Litigation was the purpose of the deeds. In them it was anticipated and provided for.

The rights of Leo Simmons, who, by the terms of the

conveyance, undertakes to carry on all litigation at his own expense, and indemnifies the alleged heirs at law from all liability for costs and expenses, are most fully, and in detail protected, secured and provided for. The deed provides that he shall retain a part of the property recovered or its proceeds; there is no provision that he shall receive a fee *equal to* thirty-three and one-third (33⅓) per cent. of any amount that may be recovered in the event of success; no contingent fee is provided for, but—

> "*out of the purchase moneys or the full amount said property may sell for*, it is distinctly understood between the parties to this indenture that the said Leo Simmons, one of the trustees, or parties of the second part, shall retain thirty-three and one-third (33⅓) per cent., or one-third, after paying all expenses, costs and expenditures of the said parties of the second part in the execution of this trust, out of the same, and the other two-thirds, or sixty-six and two-thirds (66⅔) per cent. of said purchase money, *clear of any cost or charges whatever*, to pay to the heirs of said Ann Bartlett, their heirs and assigns."

What then is his contract? It is to institute and prosecute at his own expense, all necessary actions for the recovery of the property, in consideration that he receive one-third thereof, from which he is to repay himself all expenses, costs and "expenditures" and to hold the balance as his "profits" of the transaction, and his interest in such balance as "profits" is specifically provided for in the deed, which with respect thereto, provides—

> "and it is further understood between the parties to this indenture, that should Leo Simmons die after suit has been begun for the recovery of any said property and before a settlement shall have been made, then in that case, the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons *such profits as he would have been entitled to after paying said costs and expenditures.*"

That the alleged heirs at law were to receive sixty-six and two-thirds ($66\frac{2}{3}$) per cent. of what might be recovered "*clear of any cost or charges whatsoever,*" plainly appears. The contract in the deed with Simmons absolved them from the payment of *any costs;* whatever the amount of costs incurred, the heirs were to incur no liability, whether the amount was within or exceeded the thirty-three and one-third ($33\frac{1}{3}$) per cent. which was allowed Simmons for his share of the "profits."

If they exceeded this one-third share, whose obligation was it, under the provisions of the deeds, to pay them? The heirs did not undertake to pay any costs whatsoever. By their contract with Simmons they were in no event to be liable for costs. They were to receive, absolutely, sixty-six and two-thirds per cent.—

> "out of the purchase money, or the *full amount* said property may sell for, *clear of all costs and charges whatsoever.*"

Why was the conveyance to Simmons made, if not for the purpose of absolving the grantors from costs? The actions to recover could have been instituted in their name; but in that event, if unsuccessful, they would have been liable for costs; so that for the very purpose of carrying out the agreement and protecting the grantors, and at the same time enabling Simmons to litigate at his cost and control the litigation, the deeds were framed as they are.

Simmons' contract was then to carry on all necessary litigation, paying all costs and expenses in consideration of receiving one-third of the property or proceeds recovered; the deed was executed for the very purpose of enabling the trustees to begin litigation; such litigation was to be carried on without cost or expense to the grantors; Simmons might *reimburse* himself for his *expenditures* out of a certain portion, which would be realized, if he was successful. If unsuccessful who was to repay him? In no event should the

grantors be liable. Simmons undertook to litigate and assumed the risk of paying costs and obtaining reimbursement out of the profits of the litigation.

As was well said by the trial court in disposing of the case (the opinion is printed with this brief)—

> "certain costs . . . must be paid by somebody when suit is commenced."

Under the provisions of these deeds who was to advance and pay them—the heirs were by the terms of their contract exonerated from all liability; who was to advance the costs and make the "expenditures" which were to be paid by Simmons out of the one-third of the property recovered? It must be evident that the *intent of the parties to the deed* was, as we submit, to wit: that Simmons should carry on the litigation, advance and pay all costs, in consideration of being permitted to retain the one-third provided for him by the deed. If this was not the intent why was it so important that the interest of Simmons, in the event of his death, should be so carefully secured? His co-trustee is not to be compensated for his services, nor are commissions allowed to, or provided to be paid, Simmons *as trustee*—but the deed contains provisions that in the event of his death, *his heirs* or assigns shall be paid—

> "*such profits as he would have been entitled to after paying said costs and expenditures*"—

emphatic evidence that the whole transaction was considered as a purely speculative one.

The law against champerty is enforced in most of the states; in some strictly, in others with more or less modifications.

3 A. & E. Ency. of L., 78 et seq.

The most liberal modern doctrine, with respect to the rule against champerty, is well stated by the court in Brown *vs.* Bigne, 21 Ore. 260, referred to in the brief of counsel for plaintiffs in error. In that case the court said (266):

> "The doctrine of champerty is directed against speculation in law suits, to repress the gambling propensity of buying up doubtful claims. It is not, and never was, intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it."
>
> "But when such contracts are made for the purpose of stirring up strife and litigation, harrassing others, inducing suits to be begun *which otherwise would not be commenced* or *for speculation*, they come within the analogy and principles of that doctrine, and should not be enforced."
>
> "What was said by Thayer, J., in relation to the doctrine of champerty in Dahms *vs.* Sears, 13 Ore. 47, is in regard to contracts between attorney and client, and has no application here. The relation of attorney and client did not exist between Brown and Bigne, *and this opinion is confined to the case before us.*"

Upon examination of the case in 13 Oregon it will be found that the law against champerty is still enforced in that State, and that upon the principles announced in that case the deeds in controversy should be held void.

In Martin *vs.* Clarke, 8 R. I. 389, it was said that—

> "the rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law."
>
> "A contract between an attorney and counsellor at law and a client, that the attorney shall prosecute a claim *at his own cost and charge for a part of the subject in litigation* is champertous, illegal, and void."

In Belding *vs.* Smythe, 138 Mass. 530:

> "A executed two instruments, which purported to assign to B, an attorney at law, one-half of A's interest in the estate of C, and to authorize B to prosecute A's claim against the estate, and receive the sum recovered; and provided that A should *be saved harmless from all costs and charges if B was unsuccessful* in establishing the claim, and, if he was successful, that the amount of the cash expenses should be deducted from the sum recovered *and be retained by B*, and the remainder be divided equally between A and B." Said the court (532).
>
> "We cannot distinguish this agreement from an agreement that the defendant will *prosecute the claim at his own expense and risk*, unless he is successful; and, if successful, that his cash expenses shall be paid out of the sum recovered and the remainder be equally divided. The conveyance of the one undivided half part was executed *for the purpose of inducing the defendant to prosecute* the plaintiff's claim, and was a method of securing to the defendant the share of the property recovered, which it was agreed he should have if successful. If this interest had been previously acquired for other purposes, a subsequent agreement for the prosecution of the claim upon the terms stated would not be champertous, because the defendant would have had a legitimate interest in the litigation. But the two instruments constitute plainly but one transaction, and show that the defendant procured evidence in support of contemplated litigation in which he had no interest, and then prosecuted it only for the share of the proceeds he might get out of it under an agreement made for that purpose with the plaintiff."

So in Lancy *vs.* Havender, 146 Mass. 615, it was held that—

> "An agreement by creditors, signed by them, to pay a person employed 'to collect or aid us in collecting our several claims' one-half of the amount

> collected, whether the debtor 'shall settle with or without going into insolvency—the undersigned to pay no expenses, not even from their one-half of whatever may be received'—is unlawful and void for champerty."

In Gilbert *vs.* Holmes, 64 Ill. 548, 554–5:

When a party, having an equitable claim to lands, had abandoned the same for a period of six years, and left the State, declaring that he would have nothing more to do with them; and the complainant, who was not a relative of such party, and was not an attorney whom the party had sought to aid him in the enforcement of his claim, *sought such party and procured a power of attorney* and bond from him, whereby he might prosecute his rights, and, if successful, was to receive one-half of what he might recover, and he was to pay *attorney's fees and all the costs, in case he was unsuccessful*, but if successful, the principal was to pay half the costs, but no attorney's fees. It was *held* that this arrangement fell within the very definition of champerty.

In Boardman *vs.* Thompson, 25 Iowa, 487, where it was stipulated—

> "That the attorneys were to advance all costs and expenses in procuring the testimony, and all other costs, for which, together with their traveling expenses and hotel bills, *they were to be reimbursed* out of the sum recovered, in addition to the per cent. stipulated. *Held* that the contract was void, as being against public policy."

This case repudiates Wright *vs.* Meek, 3 Greene, 484, cited by plaintiffs in error.

In Barker *vs.* Barker, 14 Wisc. 142, 154, (1861) it appeared that the case was prosecuted in pursuance of an agreement that the parties were to convey their respective shares, if recovered, in consideration of the sum of one hundred dollars to be paid each of them on making the conveyance, by the party prosecuting their rights, held that

the contract was chamertous, and that the court of its own motion, on the above facts, would refuse to entertain the cause.

In Lafferty *vs.* Jelley, 22 Ind. 471, (1864) where A, by power of attorney, constituted B, a lawyer, his agent to secure and collect his interest in an estate, and, as a part of the same transaction, B agree to prosecute the claim for A for one-half of whatever of said estate he might so obtain, it being apparent that litigation in court was contemplated for the recovery of said claim, such contract held champertous and void.

In Ohio there is no statute against champerty or maintenance, but contracts founded on such considerations are void.

Weakly *vs.* Hall, 13 Ohio, 167 (1844).

To the same effect are—

Backus *vs.* Brown, 4 Mich. 535 (1857).

Gruber *vs.* Baker, 9 Lawyer Rep. Ann. 302, 306 (Nevada, 1890).

Plaintiffs Authorities.

The case of McPherson *vs.* Cox, 96 U. S. 404, relied on by plaintiffs in error is not in point. In that case the defendant was indebted to her attorneys for services rendered, a personal liability in a fixed sum, and it was subsequently agreed that they should be paid out of the proceeds of certain real estate, in and about the recovery of which the indebtedness had been created. There was no agreement that the attorneys should prosecute the litigation at their own cost or expense; nor were they to look for payment solely to the property recovered, as was said by the court (416):

> "The single fact that they agreed to wait for their money until complainant could sell the land, and to receive a fixed sum out of the purchase money, does

See also Ormson vs. Hilton 96 Ga. 577 (1895) where the rule is strictly enforced

> not, under any definition of champerty bring it within that principle."

But in the case at bar, as was well said by the court below. (R. 23):

> "The attorney did all the things which are in these authorities enumerated as champertous. He agreed to pay the costs of the litigation; he agreed to take as his compensation a part of the land which was the subject of the suit, or a part of the proceeds of a sale of it, which amounts to the same thing, and his compensation was not a fixed sum of money, payable out of the proceeds of sale, but a contingent share of the very thing to be recovered or of the money that might be received by way of settlement or compromise; and the character of the enterprise on the part of the attorney was so plainly a speculative one that in the deed the net results to him are mentioned as 'profits.'"

Roberts *vs.* Cooper, 20 How. 467, also cited by plaintiffs in error, was a case in which the plaintiff in ejectment had purchased with notice that the defendant was in possession under a claim of title, and involved the question whether a person out of possession could convey a valid title under the laws of Michigan. The claim was also made that the conveyance under which plaintiff claimed was champertous, because by the conveyance he purchased stock in a mining corporation, which company was interested with him in the realty. This court, however, said (484) that—

> "There was *no offer* to prove that Cooper had agreed to carry on the suit in consideration of receiving a share of the land in case of success; on the contrary, the offer was to show that he 'purchased stock' in a mining corporation; that the legal title to the land was conveyed to him in trust for himself and the other stockholders; and as a consequence of the legal title being vested in him the suit was necessarily brought in his name. It needs no argument to show that such a transaction has none of the characteristics of champerty."

Traer *vs.* Clews, 115 U. S. 528, involved the distinction between the assignment of *a mere right* to file a bill in equity for fraud committed upon the grantor, and the conveyance of *property* to recover which the grantee may be compelled to bring suit.

It might be remarked in this connection that Simmons did not purchase or take any interest in the tract conveyed, except what he might recover by the execution of his contract and by that only. If he recovered nothing, he got nothing and was out his expenditures.

Moore *vs.* Ring, 82 Mo. 468, is in the same line with Traer *vs.* Clews.

Wright *vs.* Meeks, 3 Greene, 484, is overruled by Boardman *vs.* Thompson, 25 Iowa, 487, already herein cited.

In Bentinck *vs.* Franklin 38 Tex. 458, 473, the court, while holding that the law against champerty is not in force in that State, says:

> "Yet it would certainly be very wrong for attorneys to become mere *jobbers and speculators*, to hunt up rotten titles and ferment litigation."

Lytle *vs.* State, 17 Ark. 608, is also to the effect that champerty is not an offense against the laws of Arkansas.

It is true that in Mott *vs.* Small, 22 Wend. 403, Chancellor Walworth did give expression to the lines quoted in the brief of plaintiffs in error (15), but he continued as follows (406):

> "I do not think, however, that agreements actually champertous, as where a stranger to the subject of the litigation, who has no interest therein in law or equity, or an expectancy, by the ties of blood or affinity, agrees to assist in embroiling his neighbors in litigation, or in carrying their suits through the different courts after they are commenced, upon a stipulation that he shall receive a share of the fruits of the litigation as a reward for his mischievous interference, can be enforced in courts of justice."

In concluding, we can find no more apt expressions respecting the character and interpretation of the conveyances under consideration than were made by the court below in disposing of the case when it said:

> "If this be not champerty, we fail to see wherein there can be champerty; for we are not willing to limit the law, as the argument for the appellants would seek to have us do, to such extreme, and we may even say fantastic, enterprises as were developed in the case of Johnson *vs.* Van Wyck. We must regard an agreement by an attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery or of the thing in dispute as obnoxious to the law against champerty; and that this was the character of the arrangement in the present case we are entirely satisfied."

> "The very thing in dispute was conveyed or sought to be conveyed in advance to the attorney and an associate for the express purpose of enabling the attorney to conduct the litigation on his own account and at his own cost and expense; and in consideration of this he was to retain at the end of the litigation one-third of what had been conveyed to him, and was to account to his clients for the other two-thirds. This was certainly an agreement on his part to take as his compensation a part of the thing in dispute, and it does not alter the case at all that the land when recovered was to be sold. That was only the practical mode for a division of proceeds between the parties to the enterprise.
>
> "There was considerable argument on behalf of the appellants expended in an attempt to show that the deed which contained the agreement of the parties did not expressly provide for the payment of the costs and expenses of the litigation by the atttorney, and that he might be regarded as advancing the costs in the shape of a loan to his clients. It may be admitted that the contract contains no express

covenant that the attorney shall pay the costs of litigation, but no express covenant for that purpose is required if that was the necessary result of the contract. The title, so far as the clients had title to convey, was vested in the attorney and his co-trustee for the express purpose of instituting suits in their own names and in their own rights, and if the contract were wholly silent on the subject the plain inference would be that they should pay the costs and expenses. Costs and expenses were to be paid; costs and expenses, we presume, were paid, and plaintiffs are primarily liable for such costs and expenses.

"But we are not left to this inference alone, nor is the contract silent upon the subject. The express provision of this document is that Simmons shall retain one-third of the proceeds of recovery 'after paying all expenses, costs and expenditures,' and that the heirs of Ann Bartlett shall receive two-thirds of such proceeds 'clear of any cost or charges whatever.' The plain import of this is that the heirs of Ann Bartlett shall be at no cost or expense whatever, and that Simmons shall receive one-third of the proceeds of the recovery, after he has paid the 'expenses, costs and expenditures.' In other words, his right to the receipt of his compensation is dependent on his previous payment of costs and expenses, and such payment was necessarily part of the consideration for the compensation which he was to have.

"We are unable to distinguish this case in principle from that of Johnson *vs.* Van Wyck, and we think the court was entirely right in applying the law of that case to the present suit."

Respectfully submitted.

W. F. MATTINGLY,
LEON TOBRINER,
For Defendants in Error.

APPENDIX.

Opinion of Justice McComas on Trial at Nisi Prius.

I have taken a somewhat longer time to consider this important question than I had expected to do; but I am now prepared to dispose of it by ruling upon the objection to the proffer of this testimony.

This action of ejectment was instituted by E. J. Peck and Leo Simmons, trustees, against the defendant, Christian Heurich, to try the title of a certain part of the lands now in possession of the defendant under claim of title, the legal title to which purports to have been conveyed by the heirs at law of Ann Bartlett, deceased, to these plaintiffs. About twenty actions of ejectment appear by the calendar before me to be now pending and to have been instituted by the same plaintiffs against certain defendants now in possession and claiming title to certain parcels of the land whereof evidence has been introduced tending to show that Ann Bartlett died seized on April 3, 1876, her husband, John L. Bartlett, having survived until 1884.

The plaintiff introduced a deed dated November 8, 1828, from William A. Bradley, conveying to Ann Bartlett about forty-six acres of land in this District, part of "Long Meadows" and "Chance," and thereafter evidence tending to show her coverture, her death, the death of her husband, and the heirs at law of Ann Bartlett. The plaintiff then offered in evidence a deed of Caldwell E. Smith and others, heirs at law of Ann Bartlett, deceased, conveying the same forty-six acres of land described as part of "Long Meadows" and "Chance" now the subdivision "Isherwood," to Ezra J. Peck and Leo Simmons, trustees; also a deed of Annie L. Peck, an heir of Ann Bartlett, wife of E. J. Peck, to H. A. Clarke, trustee, and also a deed from H. A. Clarke, trustee,

to E. J. Peck and Leo Simmons, trustees. The first deed bears date October 20, 1891; the second the date of June 22, 1892, and the third the date of June 23, 1892. The last two are merely the formal conveyance intended to vest in the trustees named in the first deed the legal title of Annie L. Peck, wife of E. J. Peck, one of the trustees in the lands fully described in the first deed. The deeds as recorded in Liber 1768, one of the lands records, have, as is usual, been offered in evidence.

This suit was instituted September 10, 1892. These deeds were recorded November 23, 1892. The first deed to which the last two are supplemented only, though dated October 20, 1891, contains one certificate (authenticating an acknowledgment thereto dated April 8, 1892), which certificate is dated October 15, 1892, one month subsequent to this action of ejectment. The defendant's counsel objected to this deed in evidence because it is champertous and therefore void. It purports to be a conveyance of the lands mentioned by the heirs at law of Ann Bartlett to these plaintiffs as trustees, and contains the following:

> "In trust nevertheless to and for the following uses and purposes, namely, to take and hold possession of the said real estate and to institute and prosecute to a final conclusion in their own names any and every action, suit or proceeding in law and in equity or otherwise however, for the possession of said real estate if in their judgment expedient and to compromise, pay for and purchase any outstanding claim or title against said real estate if in their judgment expedient, and generally to do any and everything in their judgment expedient which may be necessary to vest in them a perfect and unincumbered title in fee simple to and the recovery of possession of said real estate, and upon the vesting in them of a perfect and unincumbered title in fee simple and the recovery of the possession of said real estate or before and without the same, and without such proceedings, acts and doings as they may think best and at any time, to sell and convey said real estate

or any part thereof, in fee simple or in any quantity of estate or estates to any person or persons and for such price and upon such terms as they may in their best judgment consider for the interest of the parties concerned and upon such sale or sales to convey the title sold to the purchaser or purchasers without liability on the part of the purchaser or purchasers to see to the application of the purchase money, and out of the purchase moneys or the full amount said property may sell for, it is distinctly understood between the parties to this indenture that the said Leo Simmons, one of the trustees or parties of the second part, shall retain 33⅓ per cent. or one-third after paying all expenses, costs and expenditures of the said parties of the second part in the execution of this trust out of the same. And the other two-thirds or 66⅔ per cent. of said purchase money clear of any cost or charges whatever to pay the heirs of said Ann Bartlett, their heirs or assigns, according to their respective interest, and it is further understood between the parties to this indenture that should Leo Simmons die after suit has been begun for the recovery of any said property and before a settlement shall have been made, then in that case the court having jurisdiction shall appoint a trustee to act in his stead and pay over to the heirs or assigns of the said Simmons such profits as he would have been entitled to after paying said costs and expenditures."

The Leo Simmons mentioned in this deed, it appears in evidence is the same who, as trustee, is one of the two plaintiffs in the numerous ejectment suits I have mentioned instituted to recover certain parts of these lands. He is also attorney of record for plaintiffs in this suit and in the others on the calendar before me, some of which, like this suit, appear to have been instituted before this deed was filed for record. Therefore, three witnesses have been produced by the plaintiffs. One of them, Mr. Peck, the trustee, whose wife is an heir, states that Mr. Simmons first called his attention to the

claim of the heirs of Ann Bartlett to these lands. Daniel W. Bartlett, a brother-in-law of Ann Bartlett and Fannie G. Bartlett, each say that Mr. Simmons invited them to appear before the commissioner and testify, and it appears that each of these witnesses looked to him to reimburse them for their expenses in leaving their home in Connecticut to come to Washington to testify in this cause. Certain costs to the clerk and marshal must be paid by somebody when suit is commenced. The costs and expenses in this suit have been augmented by the costs and expenses in the many like suits by these same plaintiffs against other defendants to recover title to other parcels of these same lands. These plaintiffs have deemed it expedient in their judgment in the language of this deed "to institute and prosecute to a final conclusion in their own names" actions at law "for the possession of said real estate." Should the plaintiffs succeed in this or other of these actions they are empowered to sell the lands so recovered and out of the purchase money—

> "it is distinctly understood between the parties to this indenture that the said Leo Simmons, one of the trustees or parties of the second part, shall retain 33⅓ per cent. or one-third, after paying all expenses, costs and expenditures of the said parties of the second part in the execution of this trust out of the same,"

and provision is further made that in case of the death of Leo Simmons, the court may appoint a trustee in his stead who shall—

> "pay over to the heirs and assigns of said Simmons such profits as he would have been entitled to after paying said costs and expenses."

This contract read in the light of circumstances of which the court may take notice, indeed by its very terms, imparts that Mr. Simmons, who, as resident trustee, was most accessible to

defendants, who might incur costs for which he was responsible by bringing this action in his own name, should pay the costs, the plain meaning of this contract is that he should pay all costs, expenses and expenditures; it contemplates that such a variety of litigation would involve outlay of money and that he should expend it, and that he should make such outlay, not only for costs, but for incidental expenses, and for the "expenditure" in bringing and maintaining suits he should be reimbursed out of his one-third of the proceeds. At least this contract contemplates the incurring and payment of costs by some one, and in providing that in case of the death of Mr. Simmons by whom one-third of the proceeds were to be retained after suit has been begun for the recovery of any of said property and before a settlement shall have been made, a trustee should be appointed to pay over to the heirs and assigns of Mr. Simmons "such profits as he would have been entitled to after paying said costs and expenses." This means that Mr. Simmons was to pay the costs and expenses incurred in the progress of the suits up to the time of his death or until a settlement should be made.

The contract contemplated that costs and expenses should be paid; without such payments the contract would have been abortive. The contract not only provided that Simmons should be reimbursed for "expenditures" of the trustees, the plaintiffs in said suits, out of the one-third, but it carefully provided that the other party to the contract, the heirs of Ann Bartlett should not pay anything, for while Mr. Simmons was to retain one-third, it was his duty—

> "the other two-thirds clear of any cost or charges whatever to pay to the heirs of Ann Bartlett."

A contract like this has been declared to be champertous and therefore void.

In Hevner *vs.* Matthews, 22 Wash. L. Rep. 749, it appeared that Peter Hevner had procured the deed in dispute from one

George G. Campbell under an agreement that Hevner, who knew that Corcoran was then in possession, should pay for it $1,000 in cash, and $4,000 additional—

> "when the title should be judicially determined to be in said Hevner."

The Court of Appeals decided the case upon other grounds and added—

> "that we have not considered the effect upon this suit of the apparently champertous character of the contract between George G. Campbell and Peter Hevner under which the latter received his title to the property."

That question, said the court, was not argued before it.

In Johnson, trustee, *vs.* Van Wyck, 22 Wash. Law Rep. 713, the Court of Appeals considered the recitals of certain deeds, contracts and trusts, which made up the plaintiff's claim of title in an action of ejectment. That court accepted as definitions, the following:

> "Champerty is the unlawful maintenance of a suit in consideration of an agreement to have a part of the thing in dispute."
>
> 1 Hawk P. C. 545.
>
> Co. Litt. 368.

> "A bargain to divide the land or thing in dispute on condition of his carrying it on at his own expense."
>
> Stanley *vs.* Jones, 7 Bing. 369.

The old statutes of Edward I and III are held to be declaratory only of the common law, and the court held that the contracts and combinations exposed in the recitals of the instruments under consideration in that case were within these statutes and within the policy of the older common law.

The recitals in the deeds offered in this case are plainly

of like character. The circumstances in that case are more exaggerated, the development of a scheme more advanced, and upon a greater scale, but the recitals in the deed before me show the same purpose to stir up litigation and a bargain to divide the land on condition of Mr. Simmons carrying it on at his own expense. While in that case the contract contained a covenant by the attorney to prosecute the cause at his own cost, the deed containing this contract, by the date of its record, may be presumed to have been assented to at that date, although the proof shows that the litigation therein provided for had been first suggested by Mr. Simmons to Mr. Peck, who had married an heir of Ann Bartlett. When the deed was recorded this suit had been instituted and certain costs had been incurred for which Mr. Simmons was liable and from which, by the terms of this contract, the portion of proceeds of suits apportioned to the heirs of Ann Bartlett was to be exonerated, to be "clear of any costs or charges whatever."

When such contracts are made for the purpose of inducing suits to be begun which would not be, upon speculation, they come within the doctrine of champerty, say the Court of Appeals, and should not be enforced.

In this case, as in that, these contracts are not collateral. These contracts, tainted with champerty, are the deeds under which the plaintiffs claim title in this action. They inhere and must be given effect if the plaintiff be permitted to recover thereon. This is not only a bargain to take part of the thing in dispute but to pay expenses and costs, and for reimbursement of expenditure which may possibly exceed the one-third retained by Mr. Simmons to look to the result of the bargain to divide the profits, necessarily the speculative profits, of the litigation contemplated by the contract. Under the circumstances and by the terms of these deeds I must hold them void for champerty. If void as to Mr. Simmons they are void as to his co-trustee and void as to the heirs of Ann Bartlett. They may in a

proper suit, if they have a legal title by their right. About that I cannot at this stage of the case have any opinion.

Inasmuch as I sustained the objection of defendant's counsel to these three deeds proffered in evidence, I need not discuss the other objections. Whether this first deed be invalid and not operative as a legal conveyance because not recorded within six calendar months, as required by the Act of 1791, I need not decide, because I hold it to have been void *ab initio*. With respect to the third point, that this deed was recorded two months after this suit was instituted and that the plaintiff in ejectment must have complete record title when suit is instituted, it is clear that the plaintiff can only recover in ejectment on title subsisting at the time of bringing suit. (McCool *vs.* Smith, 1 Black, 470.) To this objection the plaintiff replies that a deed is entitled to be received in evidence, although not recorded; that the execution and delivery of such a deed will pass title; that the acknowledgment is generally required to entitle a deed to be recorded, and that a deed is presumed to have been executed and delivered on the day of its date, even though, as in this case, a certification to the authority of one officer taking one acknowledgment thereto is dated one month after the institution of this suit.

Such argument would have much weight if the original deed had been proffered in evidence. The recorded deed is proffered and the recorded deed is objected to. Much of the able argument of counsel for plaintiff is aside from the objection made to the proffer not of the original but of the land record containing the deed. But because I have held this deed champertous and void I need not further discuss this further objection.